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No. _____

In The
SUPREME COURT OF THE UNITED STATES

FRANCISCO JAVIER RIVERA AGREDANO and
ALFONSO CALDERON LEON,

Petitioners,

v.

UNITED STATES OF AMERICA

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI to the U.S. Court of Appeals for the Federal Circuit

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QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Federal Circuit improperly stated the rule of law when utilizing a finding of "incongruous" (as opposed to the well established standard of "clearly erroneous") when reviewing the factual findings of the trial court and overturning several prior published decisions by the Court of Federal Claims [AGREDANO v USA; 82 Fed.Cl. 416 (2008); AGREDANO v USA 70 Fed.Cl . 564 (2006) and the similar case of Rodriguez v USA 69 Fed.Cl. 487 (2006)]. The judgment awarded in favor of Francisco Rivera Agredano in the amount of $550,854.00 was vacated on a finding by the Court of Appeals that the Trial Court's factual determination were "incongruous". The judgment represented the economic damages AGREDANO incurred after spending almost a year in a Mexican prison after purchasing a vehicle from the USA in a commercial transaction at a federal forfeiture sale and thereafter being arrested because the vehicle still contained over 37 pounds of concealed marijuana at the time of the sale by the USA to AGREDANO.

2. Whether the United States Court of Appeals departed from the accepted and usual course of judicial proceedings by refusing to transfer to the Ninth Circuit Court of Appeal the issues on appeal related to the dismissal of the petitioners' Federal Tort Claims Act ["FTCA"] causes of action by the Southern District of California. The petitioners' FTCA causes of action were dismissed and the matter transferred to the Court of Federal Claims on a breach of warranty theory after the Supreme Court issued a ruling in the case of Sosa v.

Alvarez-Machain 542 U.S. 692 (2004) finding that 28 U.S.C. 2680(k) barred any claim under the FTCA when the injury was suffered in a foreign country (eliminating the "headquarters doctrine").

3. Whether the United States Court of Appeals for the Federal Circuit improperly stated the rule of law and decided an important question of federal law in a way that conflicts with relevant decisions of this Court when holding, in effect, that the existence of a regulatory duty that is similar to a duty also implied in a contract with the USA will result in immunity for the USA for any breaches of the implied duty in the commercial transaction. [see; ruling as cited in case of Precision Pine v USA (2010) 596 F3d 817 at page 830 (Fed.Cir.2010)]

4. Whether the United States Court of Appeals for the Federal Circuit decided an important question of federal law in a way that conflicts with relevant decisions of this Court when upholding the trial court's dismissal of the claims of petitioner ALFONSO CALDERON LEON as a third party beneficiary of the commercial contract and implied warranties between the USA and AGREDANO.

5. Whether the trial court improperly stated the rule of law in a published opinion when refusing to award non-economic damages on the contention that plaintiff did not provide evidence of "reasonable compensation" for his emotional distress and did not establish the right to a specific award of monetary compensation for emotional distress injuries.

TABLE OF CONTENTS Page No.

QUESTIONS PRESENTED i

INDEX TO APPENDICES vi

TABLE OF AUTHORITIES vii

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE PETITION 6

1. The United States Court of Appeals for the Federal Circuit decided an important question of federal law that has not been, but should be, settled by this Court when the Court of Appeals overturned several published lower court decisions and vacated a judgment awarded in favor of AGREDANO in the amount of $550,854. 6

Page No.

2. The United States Court of Appeals for the Federal Circuit decided an important question of federal law in a way that conflicts with relevant decisions of this Court by utilizing an improper statement of the rule of law in a published decision overturning the factual findings of the Trial Court's published decision by utilizing an appellate standard of review of "incongruous" as opposed to the well established standard of "clearly erroneous" when overturning the factual findings of the trial court on appeal. 14

3. Whether the United States Court of Appeals for the Federal Circuit improperly stated the rule of law and decided an important question of federal law in a way that conflicts with relevant decisions of this Court when holding, in effect, that the existence of a regulatory duty that is similar to a duty also implied in a contract will result in immunity for the USA for any breaches of the implied duty in the commercial transaction. [see; ruling as cited in case of Precision Pine v USA (2010) 596 F3d 817 at page 830 (Fed.Cir.2010)] 17

4. The United States Court of Appeals departed from the accepted and usual course of judicial proceedings by refusing to transfer the issues related to the dismissal of the petitioners' Federal Tort Claims Act causes to the Ninth Circuit Court of Appeal for determination in light of the lack of final judgment in the Southern District of California Federal Court 20

Page No.

5. Whether the United States Court of Appeals for the Federal Circuit decided an important question of federal law in a way that conflicts with relevant decisions of this Court when upholding the trial court's dismissal of the claims of petitioner ALFONSO CALDERON LEON as a third party beneficiary of the commercial contract and implied warranties in the contract between the USA and AGREDANO 21

6. Whether the trial court improperly stated the rule of law in a published opinion when refusing to award non-economic damages on the contention that plaintiff did not provide evidence of "reasonable compensation" for his emotional distress and did not establish the right to a specific award of monetary compensation for emotional distress injuries 23

CONCLUSION 27

INDEX OF APPENDICES Page Numbers

APPENDIX A
RULINGS OF COURT OF APPEAL 1-8

APPENDIX B
RULING OF COURT OF FEDERAL CLAIMS 9-89

APPENDIX C
RULING OF SOUTHERN DISTRICT
OF CALIFORNIA 90-103

APPENDIX D
DENIAL OF PETITION FOR REHEARING 104

TABLE OF AUTHORITIES **Page Number**

CASES

Am. Pelagic Fishing Co v US 379 F.3d 1363 (Fed Cir. 2004) 15

Anderson v City of Bessemer City 470 U.S. 564 (1985) 9, 15, 16, 17

Baltimore & Ohio R.R. 261 U.S. 592 (1923) 8, 17

Beagle v Vasold 65 Cal.2d 166 (1966) 25

Beatty v Chesapeake Center 835 F2d 71 (1987) 16

Cervantes v United States 330 F 3d 1186 (9th Cir. 2003) 7, 11

Crisci v Sec Ins. Co of New Haven 426 P.2d 173 (Cal. 1967) 24

Dodson v J. Pacific, Inc. (2007) 154 Cal.App.4th 931 26

Garfoot v Avila (1989) 213 Cal.App.3d 1205, 1212 25

	Page No.
Hadley v Baxendale 156 Eng. Rep. 145 (Ex. 1854)	23
Klamath Irrigation v. USA 67 Fed. Cl. 504 at 533 (2005)	22
Kwan v Mercedes 23 Cal.App.4th. 174 (1994)	24
Loth v Truck-A-Way Corp. (1998) 60 Cal. App. 4th 757	25, 26
Mercado v Ahmed (7th Cir. 1992) 974 F2d 863	26
Montana v. USA 124 F.3d 1269 (1997)	22
Precision Pine v USA (2010) 596 F3d 817	7, 18
Rivera Agredano v USA 595 F3d 1278 (Fed. Cir. 2010)	Passim
Rivera Agredano v USA; 82 Fed.Cl. 416 (2008)	Passim
Rivera Agredano v USA 70 Fed.Cl . 564 (2006)	Passim
Rodriguez v USA 69 Fed.Cl. 487 (2006)	1, 5, 11, 14, 21
Ryan Stevedoring Co v Pan Atlantic Steamship Corp 350 US 124 (1956)	12-13

Page No.

Sosa v. Alvarez-Machain
542 U.S. 692 (2004) 3, 4, 10-11, 12, 20

US v US Gypsum 333 U.S. 364 (1948) 16

Wynn v Monterey Club, 111 Cal.App.3d 789 (1980) 24

STATUTES

28 U.S.C. 1254(1) 1

28 U.S.C. 1346(b) 1-2

28 U.S.C. Section 1631 21

28 U.S.C. 2680(k) 1, 2, 3

TREATISES

McCormick on Damages, Section 88, pp. 318-319 25

Restatement (Second) Section 351 23

7 Wigmore, Evidence (3d ed. 1940) Section 1944 25

OPINIONS BELOW

The published decision of the Court of Appeals for the Federal Circuit [595 F3d 1278 (Fed. Cir. 2010)] reversed the published opinion of the Court of Federal Claims granting judgment in the amount of $550,854 in favor of Francisco Javier Rivera Agredano [hereinafter AGREDANO][see; AGREDANO v USA; 82 Fed.Cl. 416 (2008)] and overturned earlier published opinions by the Court of Federal Claims in the instant case [AGREDANO v USA 70 Fed.Cl . 564 (2006)] and the similar case of Rodriguez v USA 69 Fed.Cl. 487 (2006).

JURISDICTION

The JUDGMENT of the Court of Appeals for the Federal Circuit was entered on February 17, 2010. A request for rehearing and rehearing en banc was timely filed and denied in a decision issued April 16, 2010. The jurisdiction of the United States Supreme Court is invoked in a timely manner under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. 1346(b) and 28 U.S.C. 2680(k)

"... the district courts .... shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages ... for injury or loss of property or personal injury .... caused by the negligent or wrongful act or omission of any employee of

the Government while acting within the scope of his office or employments, under the circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." [28 U.S.C. 1346(b)]

"The provisions of this chapter and section 1346 (b) of this title shall not apply to – (k) Any claim arising in a foreign country." [28 U.S.C. 2680(k)]

STATEMENT OF THE CASE

AGREDANO purchased a Nissan Pathfinder from the USA at a federal forfeiture sale in San Ysidro, CA (a border city with Tijuana, Mexico) in September of 2001. In January of 2002, AGREDANO and Alfonso Calderon Leon [hereinafter CALDERON] were arrested near Ensenada, Mexico when the Mexican Federales discovered over 37 pounds of marijuana concealed in the wheel wells and underneath the back seat.

AGREDANO and CALDERON spent nearly a year in prison in Ensenada before establishing that the narcotics had been in the Pathfinder at the time that it was bought from the USA. Photographs eventually obtained from the USA (taken by the USA at the time of the seizure in January of 2001), revealed that the Nissan Pathfinder had been seized because of marijuana concealed in the gas tank but that the back seat and wheel wells (where the 37 pounds of marijuana was discovered when AGREDANO and CALDERON were arrested) had not been

searched by the USA prior to the auction sale in September of 2001.

The USA had written procedures in effect for the post forfeiture auctions requiring that the USA remove any narcotics in the vehicles before the vehicles were offered for sale. [AGREDANO, supra, at 438-439] The trial court found that these policies were enacted for the purpose of conducting the sale of property forfeited and owned (at the time of the sale) by the USA. [Id., at 438-440] There is no evidence cited by the Court of Appeals supporting the factual conclusion reached by the Court of Appeals that the written policies at issue were part of the regulatory functions of the USA or that the trial court's factual determination to the contrary was "clearly erroneous".

The USA acknowledged in sworn testimony that the consumer would not be able to detect the concealed narcotics on their own and also that there was a "laxness in procedures" (per sworn testimony of former Assistant Commissioner Jayson Ahern) at the San Ysidro border crossing at the time that the Nissan Pathfinder had been initially seized in January of 2001. [AGREDANO, Id., at 445]

A complaint was filed under the FTCA in the Southern District of California on November 14, 2002. In June of 2004, the United States Supreme Court issued the ruling in Sosa v. Alvarez-Machain 542 U.S. 692 (2004) finding that 28 U.S.C. 2680(k) barred any claim under the FTCA when the injury was suffered in a foreign country. On November 2, 2004, the

Southern District of California granted USA's motion for summary judgment as to the FTCA cause of action finding that the FTCA cause of action was barred under the decision in Sosa v. Alvarez-Machain, Id. because AGREDANO and CALDERON were arrested in Mexico.

The Southern District granted AGREDANO and CALDERON's request for leave to amend to state causes of action under the Tucker Act. The parties then stipulated to transfer the contract and implied warranty causes of action to the Federal Court of Claims where it was assigned to the Hon. Emily C. Hewitt. [Southern District Case Number 02CV2243; Docket entry filed February 3, 2005]

On March 28, 2006, the Federal Court of Claims dismissed the claim of CALDERON in a published decision finding that the evidence did not support a finding that he was an intended third party beneficiary of the sales contract between the USA and AGREDANO. [AGREDANO v USA 70 Fed.Cl . 564 (2006)] On May 3, 2007, in a published decision, the Hon. Emily C. Hewitt denied the request of CALDERON for reconsideration of the dismissal of his third party beneficiary claim.

A four (4) day trial was held on the remaining claims of AGREDANO in January, 2008. On June 27, 2008 the Honorable Emily C. Hewitt entered JUDGMENT in favor of AGREDANO on the cause of action for breach of the implied warranty and awarded special damages in the amount of

$550,854.00. No amount was awarded for general ("serious emotional disturbance") damages. [AGREDANO, Id., 82 Fed.Cl. 416 at 451-452 (2008)]

On July 2, 2008, AGREDANO filed a motion for reconsideration of the denial of reasonable compensation his "serious emotional disturbance". The motion was denied in a published opinion on July 22, 2008.

The Court of Appeals reversed the trial court judgment (and overturned several published opinions by the Court of Federal Claims) finding as follows: "Customs clearly and unambiguously stated that it was not extending a warranty regarding any aspect of the vehicle, and it is incongruous to find that Customs impliedly warranted what it expressly disclaimed." [AGREDANO v USA 595 F3d 1278,1282 (Fed. Cir. 2010)].

This factual finding by the Court of Appeal is contrary to the findings of both trial court judges who have interpreted the scope of the "as is" provision in relation to the implied-in-fact warranty at issue in this case. [AGREDANO v USA, 82 Fed.Cl. 416, 435 (2008) and Rodriguez v USA 69 Fed.Cl. 487, 498 (2006)] and is furthermore based on an incorrect legal standard of "incongruous".

This ruling by the Court of Appeals is particularly unfair because: (1) as the Court of Appeals referenced during oral argument, both of the parties to the commercial transaction (i.e., AGREDANO and the USA) believed that the vehicle had

been reasonably searched and that large loads of contraband removed before the sale; (2) the search at issue was for the purposes of the commercial sale transaction and NOT to fulfill any regulatory duty owed by the USA; (3) the USA conceded that the consumers would not be able to discover the concealed marijuana on their own nor was any specific warning or disclaimer provided of the need to have the Pathfinder further examined for potentially remaining concealed narcotics; and, (4) the USA conceded that there was a "laxness in procedures" in regard to vehicle searches by the USA at the time of the sale and that if the Pathfinder had been adequately searched, **as required by written policies for the commercial transaction**, before it was sold, the 37+ pounds involved in this case would have been discovered and removed. [AGREDANO, Id., at 444]

REASONS FOR GRANTING THE PETITION

1. The United States Court of Appeals for the Federal Circuit decided an important question of federal law that has not been, but should be, settled by this Court when the Court of Appeals overturned several published lower court decisions and vacated a judgment awarded in favor of AGREDANO in the amount of $550,854.

The decision rendered by the United States Court of Appeals for the Federal Circuit has the potential to unfairly and adversely impact many members of the general public. The ruling furthermore will have an unreasonably disparate impact on individuals (including US citizens) who purchase a vehicle

from the USA and then drive over the border into Mexico before being wrongfully arrested for large loads of marijuana negligently left in the vehicle by the USA at the time of the sale. In fact, this disparate impact has already occurred as another party (also a citizen of Mexico) suffering this exact same harm (imprisonment because of narcotics left in a forfeited vehicle sold at an USA auction) was allowed to proceed with his negligence lawsuit because his arrest occurred in San Ysdiro, CA and not in Mexico [see; Cervantes v United States 330 F 3d 1186 (9th Cir. 2003)].

The published decision by the Court of Appeals in this case has already been cited in another published decision, the case of Precision Pine v USA (2010) 596 F3d 817 at page 830 (Fed.Cir.2010) for a proposition that it does not particularly support. The Agredano, supra, 595 F3d 1278, 1280-1282 (Fed. Cir. 2010) case is cited in the Precision Pine, supra at 830 case for the general proposition that if the USA violates its statutory duties to an unrelated third party, a contracting party cannot rely on these violations to establish a contractual violation to a party to whom the statutory duties were not owed.

This holding has little to do with the facts or proper statement of the law involved in the Agredano v USA case as the duty owed in this case is an implied term of the contract and not an extension of the USA's regulatory obligations in general. The improper citation of the Agredano supra, 595 F3d 1278 holding in the Precision Pine 596 F3d 817, 830 case further illustrates the need for review and consistency to avoid further

misapplications of the rule of law as a result of the published decision at AGREDANO v USA, 595 F3d 1278.

This ruling will not only put innocent people at risk but also opens the door to corruption. This ruling perpetuates of the attitude expressed by Border Patrol Officer Joseph Mariloa when he testified that the Border Patrol officers were told at daily briefings to "minimize damage" during searches of seized vehicles for "resale" purposes. [Id., at 441]. Under this ruling, the USA has no obligation to specifically warn the individuals it solicits for these commercial transactions of the risk of imprisonment arising from "laxness in procedures" by the USA in regard to searches of vehicles sold at auction nor does the USA have any obligation to assist the consumer later should they be wrongfully arrested as a direct result.

The judgment of the Court of Appeals misapprehended the facts of this case by disregarding the trial court's conclusion that the implied-in-fact warranty was "founded upon a meeting of minds, which, although not embodied in an express contract, (was) inferred, as a fact, from conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding." [AGREDANO v USA, 82 Fed.Cl. 416, 440 (2008); citing, Baltimore & Ohio R.R. 261 U.S. 592 at 597 (1923)]

The ruling of the Court of Appeals misapprehended the facts of this case by finding that the mere existence of the generic "as is" provision in a sale catalog formed the "tacit

understanding" of the parties and that, as a result, the USA was not required to conduct a thorough search of the forfeited vehicle (in this case seized for the transportation of narcotics in the gas tank) to remove the rest of the concealed narcotics [narcotics which the Trial Court found that the USA had probable cause to suspect were still present; see, AGREDANO, 82 Fed.Cl. 416, 431, 433 (2008)] before selling the vehicle to the general public in an auction.

The Court of Appeals decision overlooked the principle of law (particularly in light of the fact that the USA did not brief or argue this basis for reversal on appeal) that the trial court's factual conclusions must be "clearly erroneous" [Anderson v City of Bessemer City, 470 U.S. 564 (1985)] before being overturned on appeal.

A review is warranted in light of the fact that there is such a disparity in opinion regarding the true scope of the "as is" provision; i.e., not only is there a contradiction between the two trial court Judges and the Court of Appeal, even the Court of Appeal's opinion involved a concurring opinion by Circuit Judge Dyk and an Errata issued February 24, 2010 (as to the source of the purported publication of the "as is" provision to the consumer). This shows that the question is by no means a clear and unequivocal question and is instead one on which learned minds have already demonstrated division.

This case may be one of the first cases to examine whether or not the abolishment of the "headquarters defense"

by the US Supreme Court ruling in Sosa v Alvarez (2004) 542 US 692 case should result in recovery in the Court of Claims under implied warranties. This case would not even be in the Court of Claims or before the Court of Appeals for the Federal Circuit but for the abolishment of the FTCA cause of action as a result of the the Sosa v Alvarez (2004) 542 US 692 decision in June of 2004.

The rationale for the decision in the Sosa v Alvarez (2004) 542 US 692 case (a tort case wherein agents for the USA plotted in the USA to kidnap a criminal suspect in Mexico and fly him to El Paso, Texas for arrest) does not apply under the facts of this case (a commercial transaction entirely performed in the USA) and the application of the Sosa, Id., holding to the facts of the present case ultimately resulted in the harsh and unfair result issued by the Court of Appeals for the Federal Circuit (a decision issued after the Court of Appeals improperly re-weighed the facts on appeal and rejected the facts that the Court of Appeals, on what appears to be a cursory review of the record, found "incongruous").

As a result of the abolition of the "headquarters doctrine" in Sosa v. Alvarez-Machain 542 U.S. 692 (2004), the parameters of implied warranty in commercial transactions wherein the USA's commercial obligations share some of the same duties as the USA's regulatory functions should be set forth. The extent to which individuals injured by the negligent performance of an implied contractual obligation can look to the Court of Federal Claims for relief under implied warranty

theories following Sosa v Alvarez (2004) 542 US 692 is particularly important in situations like the present case wherein the USA elects to enter into commercial transactions with individuals who may be reasonably anticipated to visit or live in Mexico and negligently exposes them to substantial risk of harm by failing to adequately search forfeited merchandise to remove large loads of contraband before selling merchandise (or even to provide warnings of the risk created by the acknowledged "laxness in procedures" to their contracting partner).

As such, a review is requested of these exceptionally important questions and also of the components of the decision which are contrary to established precedent as this published decision could adversely impact a large number of people.

The decision will [and already has; see Cervantes v United States 330 F 3d 1186 (9th Cir. 2003) and Rodriguez v USA 69 Fed.Cl. 487 (2006)] disparately adversely impact individuals who choose to drive vehicles purchased from the USA, in the USA, into Mexico. This includes US citizens such as Adrian Rodriguez, US citizen and social worker from Chula Vista, CA, who was arrested and placed in jail in Tijuana, Mexico for the same reason (narcotics left by the USA in a vehicle purchased at a USA forfeiture auction) as Jose Cervantes, AGREDANO, and CALDERON.

Of these four gentlemen, only Jose Cervantes (a Mexican citizen arrested at the San Ysidro, California border crossing), was allowed to pursue his claim against the USA.

The sole distinction being the country where the concealed marijuana was detected by the authorities. This is an extremely random, inconsistent and inequitable interpretation of the law as a result of the current state of the application of the Sosa v Alvarez 542 US 692 ruling to these commercial transactions.

This published ruling will also have an disparate impact on litigants should the holding in this published case be utilized in other cases to support the reversal of the trial court's factual findings by a Court of Appeals on a diluted standard of "incongruous" as opposed to the established and accepted standard of "clearly erroneous".

This ruling also opens the door to a re-evaluation of the facts on appeal even in cases where the respondent does not even argue on appeal that the facts as found by the trial court were erroneous – much less "clearly erroneous" – and thereby denying the petitioner the opportunity to brief the issue (an issue raised for the first time in this case in the decision issued by the Court of Appeals).

The opinion of the Court of Appeals is also contrary to the holding in the case of Ryan Stevedoring Co v Pan Atlantic Steamship Corp 350 US 124 (1956) in that in the Ryan, Id., case, one of the contracting parties was forced, by the nature of the transaction itself, to rely upon the other party to perform critical functions relating to the "inescapable elements of the service undertaken" [AGREDANO, 82 Fed Cl. 416 at 440 citing Ryan Stevedoring Co v Pan Atlantic Steamship Corp 350

US 124 at 133] In Ryan, Id., the "inescapable element of the service undertaken" was that the obligation of the stevedore company "necessarily includes" the obligation to ".... not only ... stow the [cargo], but to stow [it] properly and safely" [Id., at 133] because the other party to the contract had absolutely no ability to control or oversee this essential component of the contract.

Likewise, in the instant case, it was conceded by the USA that the purchaser at these federal forfeiture auctions has no ability to detect concealed narcotics on his or her own and must necessarily rely upon the USA to not only deliver possession of the vehicle but to search the vehicle and remove concealed narcotics before the delivery of possession. [AGREDANO, supra, at 436, 445] The contract for sale in this case "necessarily included" the removal of narcotics from the vehicle before the sale by the only contracting party with the ability to detect and remove concealed narcotics – the USA. [Id., at 436, 445].

As such, the ruling by the Court of Appeals finding that the USA had no such obligation is contrary to the factual determination of the trial court judge (which was not found to be "clearly erroneous") as well as the holding in the US Supreme Court case of Ryan Stevedoring v Pan Atlantic Steamship Corp 350 US 124 at 133.

2. The United States Court of Appeals for the Federal Circuit decided an important question of federal law in a way that conflicts with relevant decisions of this Court by utilizing an improper statement of the rule of law in a published decision overturning the factual findings of the Trial Court's published decision by utilizing an appellate standard of review of "incongruous" as opposed to the well established standard of "clearly erroneous" when overturning the factual findings of the trial court on appeal.

The Court of Appeals reversed the trial court judgment (and overturned several published opinions by the Court of Federal Claims) finding as follows: "Customs clearly and unambiguously stated that it was not extending a warranty regarding any aspect of the vehicle, and it is incongruous to find that Customs impliedly warranted what it expressly disclaimed." [AGREDANO v USA 595 F3d 1278,1282 (Fed. Cir. 2010)]

This factual finding by the Court of Appeal is contrary to the findings of both trial court judges who have interpreted the scope of the "as is" provision in relation to the implied-in-fact warranty at issue in this case. [AGREDANO v USA, 82 Fed.Cl. 416, 435 (2008) and Rodriguez v USA 69 Fed.Cl. 487, 498 (2006)].

The factual conclusions referenced above by the Court of Appeals were reached without specific briefing on the issue because the USA did not argue on appeal that the trial court's

factual findings were clearly erroneous: "In our opening brief, we demonstrated that the trial court erred as a matter of law in holding the United States liable to [AGREDANO] under a breach of contract theory." [USA Reply brief, pg. 1] Any theory based on the contention that the trial court's factual findings were "clearly erroneous" should have been deemed waived by the USA as it was not raised in the USA brief on appeal or asserted by the USA during oral argument (despite an invitation by the panel during oral argument to do so).

Further, the opinion utilizes the wrong standard, reversing the trial court because the trial court's factual findings were "incongruous" [[AGREDANO v USA 595 F3d 1278,1282 (Fed. Cir. 2010)]. "Incongruous" is not the standard that is utilized to evaluate a trial court's factual findings. Under established precedent, the trial court's factual findings must be "clearly erroneous" before the Court of Appeals is authorized to overturn them. [Am. Pelagic Fishing Co v US 379 F.3d 1363, 1371 (Fed Cir. 2004) and Anderson v City of Bessemer City, 470 U.S. 564 (1985)].

At oral argument, the USA emphasized repeatedly that the USA was contending that the appeal was based on an error in law – not a finding that the trial court's factual conclusions were "clearly erroneous". Yet, the Court of Appeal necessarily had to disregard the trial court's factual conclusions when deciding to reverse the trial court's judgment. As held in the case of Anderson v City of Bessemer City, 470 U.S. 564 (1985), if the trial court's factual findings as to the parties

"tactic understandings" were not "clearly erroneous", the judgment should not be reversed on appeal. In Beatty v Chesapeake Center 835 F2d 71, 74 (1987) in a concurring opinion, it was stated as follows: " .... in a court trial, a district court's determination which the appellate court finds uncongenial must, nevertheless, be affirmed as to an issue of fact unless clearly erroneous".

The US Supreme Court held: "If the District court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that, had it been sitting as the trier of fact, it would have weighed the evidence differently. This is so even when the district court's findings do not rest on credibility determinations, but are based on physical or documentary evidence or inference from other facts." [Anderson, Id. at 565, 573-574; citing US v US Gypsum 333 U.S. 364, 394-395 (1948)]

In the instant case, the Honorable Emily C. Hewitt conducted an exhaustive review of the evidence relating to the scope of the "as-is" provision [AGREDANO v USA, 82 Fed.Cl. 416, 422, 435-437 (2008)] and ultimately concluded that: "... the 'as is' clause in the contract does not preclude the existence of a possible implied-in-fact warranty in this case because the "as is" clause does not cover a situation in which the defendant sells the Pathfinder with concealed contraband to plaintiff." [AGREDANO v USA, 82 Fed.Cl. 416, 435 (2008)] .... the plain meaning of the 'as-is' clause limits its scope to the construction, maintenance, and mechanical operation of the vehicle and does not cover a situation in which 'the vehicle had

been modified in a way that had no effect on its ability to function for transportation' by 'introduc[ing] an attribute not ordinarily associated with [the vehicle's ability to function for transportation].'" [AGREDANO v USA, 82 Fed.Cl. 416, 435 (2008) citing AGREDANO v USA 70 Fed.Cl 564 at 572 (2006) citing Rodriguez v USA 69 Fed.Cl. 487, 498 (2006)]

As discussed in AGREDANO v USA, 82 Fed.Cl. 416, 440 (2008) the scope of the "as is" provision is "founded upon a meeting of minds, which, although not embodied in an express contract, is inferred, as a fact, from conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding." [Id., at 440; citing, Baltimore & Ohio R.R. 261 U.S. 592 at 597 (1923)].

The finding of the trial court as to the scope of the "as is" provision in reference to the implied-in-fact warranty in the instant case is based on an evaluation of the facts by the trial court and should not be overturned on appeal absent a showing that the trial court's conclusion was "clearly erroneous" [Anderson v City of Bessemer City, 470 U.S. 564 (1985)]

3. Whether the United States Court of Appeals for the Federal Circuit improperly stated the rule of law and decided an important question of federal law in a way that conflicts with relevant decisions of this Court when holding, in effect, that the existence of a regulatory duty that is similar to a duty also implied in a contract will result in immunity for the USA for any breaches of the implied duty in the commercial transaction. [see; ruling as cited in case

of Precision Pine v USA (2010) 596 F3d 817 at page 830 (Fed.Cir.2010)]

The published decision by the Court of Appeals in this case has already been cited in another published decision, the case of Precision Pine v USA (2010) 596 F3d 817 at page 830 (Fed.Cir.2010). The case is cited for the proposition that if the USA violates its statutory duties to an unrelated third party, a contracting party cannot rely on these violations to establish a contractual violation to a party to whom the statutory duties were not owed. This holding has little to do with the facts or circumstances involved in the AGREDANO v USA case.

The search at issue in this case was specifically for the purposes of the sale – a commercial transaction. There is no regulatory obligation which compelled the USA to enter into a commercial transaction with AGREDANO. No such regulatory duty has been cited in any of voluminous legal briefs filed in this matter thus far. There are, however, numerous written USA directives in evidence wherein the purpose of the pre-auction searches is made undeniably clear – the searches were conducted to make sure that the vehicles were free of concealed contraband at the time of the sale transaction.

The pre-sale, post forfeiture searches are not a regulatory function of the USA but a component of the commercial sale transaction – one that the Hon. Emily Hewitt, as Trial Court judge, found that both of the contracting parties in this case presumed had been performed at the time of the sale. [AGREDANO v USA, 82 Fed.Cl. 416, 440 (2008)]

Therefore, while the USA also had a regulatory duty to conduct a thorough search at the time of seizure (which was ALSO breached in this case), the breach of the regulatory duty to search occurred prior to the implied contractual obligation to conduct a subsequent, post forfeiture and pre-auction, search. After a vehicle is forfeited, it belongs to the USA.

The fact that the pre-auction search was post forfeiture and for the purpose of the sale transaction was documented in the written directives issued by the USA. The goal of the pre-auction search was to ensure that the narcotics were removed for the purpose of the commercial sale transaction. However, the Court of Appeals, not being the trier of fact and conducting what appears to have been a cursory review of the factual record on appeal, was not aware during oral argument that there were separate searches (one for the seizure and a subsequent one for the purpose of the sale) and appeared to have overlooked this distinction again at the time of issuing the judgment which reversed the trial court's findings on this issue.

As a result, the published decision in this case is now being used to define the extent to which a breach of a regulatory duty can support a breach of a contractual duty. This is a gross misapplication of the rule of law to the facts of the Agredano case and further support for the contention that the "clearly erroneous" standard should not be diluted by case law allowing the Court of Appeals to re-weigh and disregard any facts that the Court of Appeals finds "incongruous" [see; AGREDANO v USA 595 F3d 1278,1282 (Fed. Cir. 2010)].

4. The United States Court of Appeals departed from the accepted and usual course of judicial proceedings by refusing to transfer the issues related to the dismissal of the petitioners' Federal Tort Claims Act causes to the Ninth Circuit Court of Appeal for determination in light of the lack of final judgment in the Southern District of California Federal Court

A request was and is made to transfer the appeal of the dismissal of FTCA claims to the Ninth Circuit Court of Appeal for determination. This case is in a unique posture procedurally as the issuance of the Sosa v Alvarez (2004) 542 US 692 ruling occurred after the FTCA case was filed in this case in the Southern District of California. The subsequent transfer of the case to the Court of Federal Claims was done without entry of final judgment by the Southern District on the summary dismissal of the FTCA claims against the USA. The history of this case and the recent refusal of the Court of Appeals for the Federal Circuit to hear the issues related to the dismissal of the FTCA claims have combined to deny AGREDANO and Alfonso Calderon of the right to be fully heard on this matter.

The issues related to the summary dismissal of the FTCA cause of action should be transferred to the Ninth Circuit Court of Appeals for determination. The FTCA issues were not waived (see; stipulation to dismiss without prejudice and order entered February 3, 2005 in Southern District of California case number 02CV2243) and have not yet been conclusively determined in this action. No final judgment from which an appeal could be taken was entered as a result of the dismissal of the FTCA causes of action until the instant appeal was filed (at

which time the issue of the dismissal of the FTCA causes of action was properly raised). [28 U.S.C. Section 1631]. As the Court of Appeals for the Federal Circuit refused to consider this properly raised issue on appeal, a transfer to the Ninth Circuit Court of Appeal is proper and the only equitable manner in which to ensure that the petitioners' rights in this case are fully and fairly considered.

5. Whether the United States Court of Appeals for the Federal Circuit decided an important question of federal law in a way that conflicts with relevant decisions of this Court when upholding the trial court's dismissal of the claims of petitioner ALFONSO CALDERON LEON as a third party beneficiary of the commercial contract and implied warranties in the contract between the USA and FRANCISCO RIVERA AGREDANO

The Court previously dismissed the claim of CALDERON in a published decision dated March 28, 2006. In a similar case pending in the United States Court of Federal Claims, Rodriguez v. USA; 69 Fed. Cl. 487 (2006), the Honorable Charles Lettow dismissed a claim by Adrian Rodriguez in a published decision dated January 30, 2007 based upon a similar rationale

The claims of CALDERON were dismissed based, in part, upon a finding that the damage (imprisonment) was not foreseeable by the USA and that there was no evidence of an intent to provide a benefit to these third parties through the

contractual arrangement that was created in connection with the sale of the Pathfinder to AGREDANO.

The published opinion stated in the pertinent part as follows: "The question is whether the contract for sale can be construed as intending to confer a right on Calderon as a passenger of the vehicle. The Court believes that the question whether a passenger in a vehicle should be considered a third party beneficiary is a close one. ... In the case of a sale of an automobile, however, the court cannot say that the main purpose of the sale is to protect or benefit future passengers." [Rivera Agredano v. USA; 70 Fed.Cl. 564, 579]

To be considered an intended third party beneficiary, the contract must reflect the express or implied intention of the parties to benefit the third party. The intended beneficiary need not be specifically or individually identified in the contract, but must fall within a class clearly intended to be benefitted thereby. [Montana v. USA 124 F.3d 1269, 1273 (1997); Klamath Irrigation v. USA 67 Fed. Cl. 504 at 533 (2005)]

The trial testimony of the USA witnesses confirmed that the were for the express benefit of ultimate occupant and also that the risk of imprisonment to **any occupant** of the vehicle (not just the purchaser) was foreseen as a damage that could occur if the searches were not adequately performed prior to the sale. Therefore, this case is unique in that an implied term of the contract was for the express purpose of protecting the entire class of future occupants from wrongful arrest. The USA

specifically foresaw (per the Assistant Director Lawrence Fanning and Assistant Commissioner Jayson Ahern) that the risk of arrest extended to any occupant of the vehicle (not just the purchaser) and the goal of the pre-sale search was to protect the class of potential occupants, not just potential purchasers.

6. Whether the trial court improperly stated the rule of law in a published opinion when refusing to award non-economic damages on the contention that plaintiff did not provide evidence of "reasonable compensation" for his emotional distress and did not establish the right to a specific award of monetary compensation for emotional distress injuries

The unique set of circumstances involved in this case creates precisely the type of situation wherein emotional distress damages can be said to be a "natural result of the breach, or those that are a consequence of special or unusual circumstances which were in the reasonable contemplation of the parties when making the contract" [Restatement (Second) Section 351; Hadley v Baxendale 156 Eng. Rep. 145 (Ex. 1854)]

Under the circumstances and context of this sale (which occurred close to the USA/Mexico border crossing at San Ysidro, CA), a breach of the implied obligation to remove large loads of concealed narcotics before releasing the vehicle to AGREDANO was foreseeable to result in imprisonment in Mexico.

Being arrested and imprisoned as a result of the USA's breach of the implied obligation to remove large loads of marijuana from the Pathfinder before selling it to AGREDANO had the "biggest probability of resulting" in "emotional disturbance" should the breach result in the most obviously foreseeable harm – imprisonment. The object of this implied contractual term (removal of the marijuana prior to sale) was to protect the AGREDANO from arrest and was clearly designed to protect his "dignity, mental concern or solicitude (and) sensibilities" [Crisci v Sec Ins. Co of New Haven 426 P.2d 173 (Cal. 1967)]

In the AGREDANO case, the breach of the implied obligation to conduct an adequate search resulted in arrest and imprisonment. The foreseeable damage sustained as a result of imprisonment was loss of liberty – a subject matter "which so affect(s) the vital concerns of the individual that severe mental distress is a foreseeable result of breach. For many years, our courts have recognized that damages for mental distress may be recovered for breach of a contract of this nature" [Kwan v Mercedes, 23 Cal.App.4th, 174, 188 (1994) citing Wynn v Monterey Club, 111 Cal.App.3d 789 (1980) wherein a husband was allowed to recover emotional distress damages for breach of a contract with a gambling club to bar his wife from entering and from cashing her checks]

The trial court improperly applied the law in a published decision by stating that the court would not award emotional distress damages because the plaintiff did not introduce

evidence of "reasonable compensation" for his emotional distress. [AGREDANO, Id., 82 Fed.Cl. 416 at 451-452 (2008)] This part of the trial court's published ruling was not addressed in the judgment issued by the Court of Appeals. It is also an improper statement of the law.

"Pain and suffering, by definition, is an abstract concept. It is not readily calculable through a convenient mathematical formula, evidence of its precise monetary equivalent cannot be definitively presented as if it was past medical expenses or wages lost due to an injury. Indeed, the jury is only instructed to award a "reasonable" amount, that a definite standard or method of calculation does not exist, and argument urging a particular calculation or amount must not be considered evidence." [Garfoot v Avila (1989) 213 Cal.App.3d 1205, 1212;Beagle v Vasold (1966) 65 Cal.2d 166, 181 citing, 7 Wigmore, Evidence (3d ed. 1940) Section 1944, pp. 55-56; McCormick on Damages, Section 88, pp. 318-319]

"Our present system of requiring the jury to determine, without the benefit of a mathematical formula, the amount of a general damages award is not without its faults. But ..... a plaintiff may not supply, through expert testimony or otherwise, her own formula for computing such damages. .... no expert may supply a formula for computing the value of life and, by extrapolation, the value of the loss of enjoyment of life. That calculation, at present, must be left to the sound discretion of the jury." [Loth v Truck-A-Way Corp. (1998) 60 Cal. App. 4th

757, 768 citing Mercado v Ahmed (7th Cir. 1992) 974 F2d 863, 868-871].

Further, in cases where the evidence and the law establishes that the plaintiff is entitled to an award of emotional distress damages, the trier of fact cannot render an award that fails to include any compensation whatsoever for emotional distress damages. Such an award would be inadequate as a matter of law. In the case of Dodson v J. Pacific, Inc. (2007) 154 Cal.App.4th 931, 937, the California Court of Appeal (Second District) found that appellate cases finding an award inadequate for failure to account for pain and suffering involved situations where the right to recover was established and there was also proof that the medical expenses were incurred. [Id., at 937]. "While the extent of the plaintiff's pain and suffering is for the jury to decide, common experience tells us it cannot be zero." [Id., at 938]

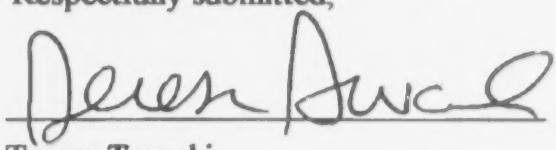
To the extent that the JUDGMENT was based upon the finding that AGREDANO failed to produce evidence of the specific amount of monetary compensation that would be "reasonable compensation" for his serious emotional disturbance, AGREDANO contends that the conclusions of law are in error as evidence of "reasonable compensation" is not required to establish the right to a specific award of monetary compensation for emotional distress injuries. [Loth v Truck-A-Way Corp. (1998) 60 Cal. App. 4th 757, 760; Mercado v Ahmed (7th Cir. 1992) 974 F2d 863, 868-871]

AGREDANO contends that prison conditions that AGREDANO had to endure and the medical bills he incurred when viewed in light of the length of time he was imprisoned [351 days, from January 24, 2002 to January 10, 2003], resulted in "serious emotional disturbance" that was specifically foreseen by the USA at the time that the contract was entitled into and, as such, the unique situation of this particular case should result in a finding that AGREDANO's emotional distress damages are recoverable in this action.

CONCLUSION

For the above reasons, the petition for a writ of certiorari should be granted and the Court of Appeals reversed.

July 13, 2010 Respectfully submitted,



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United States Court of Appeals for the Federal Circuit
2008-5114, 5115.

FRANCISCO JAVIER RIVERA AGREDANO and
ALFONSO CALDERON LEON,
PLAINTIFFS-Cross Appellants,
v.
UNITED STATES,
Defendant-Appellant.

Teresa Trucchi, Suppa, Trucchi and Henein, LLP, of San Diego, California, argued for plaintiffs-cross appellants.

Patricia M. McCarthy, Trial Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, DC, argued for defendant-appellant. With her on the brief were Tony West, Assistant Attorney General, and Jeanne E. Davidson, Director. Of counsel on the brief were Devin A. Wolak, Trial Attorney, and Christopher J. Duncan, Attorney, Office of Assistant Chief Counsel, Department of Homeland Security, United States Customs and Border Protection, of San Diego, California.

Appealed from: United States Court of Federal Claims
Chief Judge Emily C. Hewitt

DECIDED: February 17, 2010

Before MAYER, CLEVENGER, and DYK, Circuit Judges.

Opinion for the court filed by Circuit Judge MAYER.
Concurring opinion filed by Circuit Judge DYK.

MAYER, Circuit Judge.

The United States appeals the judgment of the Court of Federal Claims holding that United States Customs and Border Protection ("Customs") breached and implied-in-fact warranty when it inadvertently sold a vehicle containing concealed narcotics to Francisco Javier Rivera Agredano. See Agredano v. United States, 82 Fed. Cl. 416 (2008). Because the court erred in finding an implied warranty in the agreement between Customs and Agredano, we reverse.

BACKGROUND

Agredano attended a Customs auction of forfeited vehicles on September 5, 2001. In order to participate in the auction, Agredano was required to sign a bidder registration form stating that he "agree[d] to comply with the terms of sale contained in the sale catalog for this sale." The sale catalog, in return, stated:

A second disclaimer, printed on a flyer displayed at the auction, stated "[a]ll merchandise is sold on an 'AS IS, WHERE IS' basis, without warranty or guarantee as to condition, fitness to use, or merchantability stated, implied or otherwise. Please bid from your personal observations."

Agredano purchased a 1987 Nissan Pathfinder at the auction. The vehicle had been seized by Customs and forfeited when its previous owner attempted to transport marijuana across the Mexican border into the United States, While Customs agents detected and removed some of the marijuana at that time, more remained in the vehicle unbeknownst to Customs or Agredano. Several months after the auction, on January 24, 2002, Agredano was traveling in the Pathfinder in Mexico with Alfonso Calderon Leon, his business partner and brother-in-law. The two men were stopped at a checkpoint by Mexican soldiers who inspected the vehicle and found the hidden marijuana. Both men were arrested and spent nearly a year in prison before being

exonerated by a Mexican appellate court on January 10, 2003.

Agredano and Leon jointly filed a claim against the United States in the United States District Court for the Southern District of California pursuant to the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b), 2671-2680, alleging, inter alia, negligence decision in Sosa v. Alvarez-Machain, which held that a statutory exception to the FTCA "bars all claims based on any injury suffered in a foreign country, regardless of where the tortuous act or omission occurred." 542 U.S, 692, 712 (2004). Relying on Sosa, the district court granted the government's motion for summary judgment. The parties then stipulated to the filing of an amended complaint, alleging only contract claims, and the transfer of the action to the Court of Federal Claims.

The Court of Federal Claims held that a contract arose when Agredano agreed to purchase and Customs agreed to sell the Pathfinder, the contract contained an implied-in-fact warranty that the vehicle did not contained contraband, and customs breached this warranty. Agredano, 82 Fed. Cl. At 452. The court awarded damages for Agredano's past and future medical bills, past and future psychiatric treatment, attorney fees in connection with the criminal proceedings in Mexico, and costs incurred by Agredano's family to visit him in prison. Id. The trial court denied third-party beneficiary status to Leon, denied Agredano's request to damages for emotional distress, and held that the Customs did not violate the implied covenant of good faith and fair dealing. Id. At 428-29,447,451-52. The united States appeals the finding of an implied-in-fact warranty. Agredano and Leon cross-appeal as to third-party beneficiary status for Leon, damages for emotional distress, and the implied covenant of good faith and fair dealing. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(3).

DISCUSSION

We review the Court of Federal Claim's decision de novo for errors of law and for clear error on findings of fact. Ind. Mich. Power Co. V. United States, 422 F. 3d 1369, 1373 (Fed. Cir. 2005). Contract interpretation is a matter of law, and is therefore reviewed de novo. St. Christopher Assocs., LP.v. United States, 511 F.3d 1376, 1380 (Fed.Cir.2008).

"[T]o recover for breach of warranty, a plaintiff must allege and prove (1) that a valid warranty existed, (2) the warranty was breached, and (3) plaintiff's damages were caused by the breach." Hercules Inc. V. United States. 24 F.3d 188, 197 (Fed. Cir. 1994). At issue in this case is the first prong. It is undisputed that Customs made no express warranties regarding the vehicle, and the trial court appropriately determined that it did not have jurisdiction to entertain a claim that a warranty was implied-in-law. Agredano, 82 Fed. Cl. At 430 (cites Hercules, Inc. V. United States, 516 U.S. 417, 423 (1996). Instead, the trial court held that the contract between Agredano and Customs contained an implied-in-fact warranty that the Pathfinder was free of contraband, despite the disclaimers of warranty made by Customs at the auction.

As the trial court correctly stated, an agreement implied-in-fact requires a "meeting of minds" that can be inferred from the conduct of the parties. Id at 440)quoting Baltimore & Ohio R.R., 261 U.S. 592, 597 (1923). We have found implied." Lopez v. A.C. & S., Inc., 858 F. 2d 712, 715 (fed. Cir. 1988).

The trial court held that the actions of Agredano and Customs, indicating that coth parties believed the Pathfinder was free of contraband, demonstrate the requisite meeting of the minds to form an implied warranty. Agredano, 82 Fed. Cl. At 440. The foundation of the parties' belief is an

expectation that Customs had fulfilled its regulatory duty to remove any contraband from the vehicle before selling it. Id. At 437 ("The officers and agents of Customs are tasked with the duty to identify and removed all contraband from vehicles that cross into the United States.)". However, Customs' responsibility to remove contraband from forfeited vehicles does not provide a contractual warranty to future purchasers of the vehicles that is has done so. D & N Bank v. United States, 331 F.3d 1374, 1378-79 (Fed. Cir. 2003) ("An agency's performance of its regulatory or sovereign functions does not create contractual obligations."). While Agredano is correct that the sale of the vehicle was a commercial transaction, not a regulatory function, the source of any responsibility on the part of Customs to search vehicles and remove contraband is its regulatory function and a failure to adequately perform this responsibility does not provide a contractual remedy.

The existence of an implied-in-fact warranty is further undermined by the express disclaimers Customs made at the auction, which show that the Customs did not intend to form an implied-in-fact warranty therefore could not have occurred. The trial court held that the Customs did not disclaim a warranty that the vehicle was free of contraband by interpreting the scope of disclaimer to be limited to "the construction, maintenance, and mechanical operation of the vehicle" and not extending to "a situation in which the vehicle had been modified in a way that had no effect on its ability to function for transportation." Agredano v. United States, 70 Fed. Cl. 564, 572 (2006) (quoting Rodriguez v. United States, 69 Fed. Cl. 487, 498 (2006)). This interpretation ignores the language found in the sale catalog, which indicates that the disclaimer goes beyond mechanical operation of the vehicle by stating that no warranties are provided "regarding any aspect of the vehicle or its ability to operate" (emphasis added). The sale catalog offers as examples of aspects of the vehicle for which no warranties is

provided the vehicle's identity, previous ownership, and registration status. These examples further demonstrate that the disclaimer is not limited to the ability of the vehicle to function for transportation. Customs clearly and unambiguously stated that it was not extending a warranty regarding any aspects of the vehicle, and it is incongruous to find that Customs impliedly warranted what it expressly disclaimed.

The issues of third-party beneficiary status and damages for emotional distress raised by Agredano and Leon in their cross-appeal are rendered moot by this decision. We have considered their argument that the government violated the implied covenant of good faith dealing, and we concur with the trial court's decision on this issue.

CONCLUSION

Accordingly, the judgment of the Court of Federal Claims is reversed.

REVERSED

United States Court of Appeals for the Federal Circuit

2008-5114,-5115
FRANCISCO JAVIER RIVERA AGREDANO
and ALFONSO CALDERON LEON,
Plaintiffs-Cross Appellants,
V.
UNITED STATES,
Defendant-Appellant.
Appeals from the United States Court of Federal Claims in 05-CV-608, Chief Judge Emily C. Hewitt.

DYK, Circuit Judge, concurring.

Absent a contractual warranty disclaimer, it seems to me that the sale of an automobile by the government to a private purchaser likely carries with it an implied-in-fact warranty of fitness, including a warranty that the vehicle does not contain illegal drugs. However, I agree with the majority that the contract here explicitly disclaimed all warranties, not just relating to the operability of the vehicle. The government's regulatory practice of inspecting such vehicles for contraband cannot overcome this disclaimer. I accordingly join the majority opinion.

United States Court of Appeals for the Federal Circuit

ERRATA

February 24, 2010

Appeal No. 2008-5114,-5115, AGREDANO V. US

Precedential Opinion

Decided : February 17, 2010

Please correct the following:

On page 2, lines 5-17, delete:

> The sale catalog, in turn, stated:
>
> > The vehicles offered to you for purchase at any U.S. Customs Auction are sold "AS IS, WHERE IS". This means that neither U.S Customs or McCormack Auction Company, or EG & G Dynatrend, extend any warranties or promises of any kind regarding any aspect of the vehicle or its ability to operate, including but not limited to the vehicle's identity, previous ownership, physical condition, registration status, or ability to pass a smog certification.

A second disclaimer, printed on a flyer displayed at the

auction, stated "[a]ll merchandise is sold on an AS IS, WHERE IS basis, without warranty or guarantee as to condition, fitness to use, or merchantability stated, implied or otherwise. Please bid from your personal observation, " A second disclaimer, printed on a brochure advertising the auction,

stated:

> The vehicles offered to your purchased at any U.S. Customs Auction are sold "AS IS, WHERE IS". This means that neither U.S. Customs or McCormack Auction Company, or EG & G Dynatrend, extend any warranties or promises of any kind regarding any aspects of the vehicle or its ability to operate, including but not limited to the vehicle's identity, previous ownership, physical condition, registration status, or ability to pass a smog certification.

On page 6, lines 5 & *, delete "sale catalog" and insert "brochure"

In the United States Court of Federal Claims

No. 05-608 C (E-Filed under seal: June 24, 2008)

(E-Filed for publication: July 22, 2008)

FRANCISCO JAVIER RIVERA AGREDANO,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

Teresa Trucchi, San Diego, CA, for plaintiff. Trial; Breach of Implied-in-Fact Covenant; Failure to Remove Contraband From Seized Vehicle Prior to Resale Constitutes Breach of Implied in-Fact Covenant; Damages for Injuries Caused by Breach

Devin A. Wolak, Washington, DC, with whom were Jeffrey S. Bucholtz, Acting Assistant Attorney General, Jeanne E. Davidson, Director, and Patricia M. McCarthy, Assistant Director, Commercial Litigation Branch, Civil Division, Department of Justice, Washington, DC, for defendant. Erik J. Gantzel, U.S. Customs and Border Protection, U.S. Department of Homeland Security, San Diego, CA, of counsel.

OPINION[1]

HEWITT, Judge

I. Introduction

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[1](...continued) reason(s) for the request.

Opinion filed June 24, 2008 1 n.1.

On July 8, 2008, defendant filed its Motion to Redact Final Order (Redact Motion or Redact Mot.). Redact Mot. 1. In its Redact Motion, defendant requested the court to redact certain portions of the court's Opinion of June 24, 2008 "to avoid compromising the efforts of United States Customs and Border Protection . . . to protect the U.S.-Mexico border by publicly disclosing the specific means and methods by which they carry out their law enforcement

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1

Footnote 1 to the Opinion E-filed under seal on June 24, 2008 stated:

This Opinion is filed under seal. If any party believes that this Opinion contains protected material that should be redacted before publication, that party shall, by motion to be filed on or before July 8, 2008, request that such protected material be redacted. The motion shall indicate the specific protected material as to which redaction is requested and, with respect to each such proposed redaction, the (continued...)

duties." Id. In support of its Redact Motion, defendant submitted a copy of the protective order in this case, which had been issued by the United States District Court for the Southern District of California before the case was transferred to this court. See Redact Motion, Ex. B, 1. On July 10, 2008, plaintiff filed its Notice of Non-Opposition to Defendant USA's Motion to Redact Final Order (Pl.'s Notice), stating that plaintiff does "not oppose . . . [defendant's] requests as set forth in the [Redact Motion] filed July 8, 2008. Pl.'s Notice 1-2.

The court accepts the protective order issued in this case by the United States District Court for the Southern District of California as the law of the case. Thus, the issue before the court is whether the protective order should be modified in order to enable the court to publish this Opinion in its entirety without incorporating defendant's proposed redactions. The Federal Circuit has held "that a court may enter a protective order if 'good cause' exists to protect discovery information" but that "a presumption of public access to judicial records" exists. Baystate Techs., Inc. v. Bowers, 2008 U.S. App. LEXIS 14686, at *4 (Fed. Cir. July 10, 2008) (table) (citing Siedle v. Putnam Invs., Inc., 147 F.3d 7, 9 (1st Cir. 1998); Poliquin v. Garden Way, Inc., 989 F.2d 527, 533 (1st Cir. 1993)). The Federal Circuit further stated that "in determining whether a protective order should be modified, the court must balance the privacy interests of the parties against the public interest in access to the discovery information." Id. at *4-5 (citing Siedle, 147 F.3d at 10).

The court finds that a balancing test is not necessary in this case to determine whether the protective order should be modified. Defendant has requested redactions of portions of the Opinion that describe the policies and procedures used

by United States Customs and Border Protection, Redact Mot. passim, and plaintiff does not oppose those redactions, Pl.'s Notice 2. The court determines that the portions of the Opinion requested by defendant to be redacted contain information that is not available to the public. For these reasons, the court accepts defendant's requests contained in its Redact Motion. This case is before the court following a trial[2] on a claim by plaintiff, Francisco Javier Rivera

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2

A number of the witnesses presented at trial were Spanish speakers and required interpreters to translate their testimony into English for the court. Under Federal Rules of Evidence (FRE) 604, "An interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation to make a true translation." FRE 604 (2006). The court required each interpreter to undergo a voir dire by the counsels and the court and then to take the oath administered to every witness. The court qualified each interpreter as an expert in the Spanish language. Agredano Trial Transcript (Tr.) 10:7-9; 14:20-22; 753:6-8. For convenient reference, the names, in alphabetical order, and a description of the interpreters, upon whose live translation the court relies in this opinion, follow:

Ms. Eugenia Arguello trained as an English as a Second Language (ESL) teacher at the national university of Mexico; she served as an ESL teacher for fourteen years. Id. at 751:4-10. She then attended Southwestern College in the United States and trained to be an interpreter for two and a half years. Id. at 751:12-14. She has a California Certificate for Interpreters and a Federal Interpreter Certificate. Id. at 751:17-19. She has been qualified as an expert in the Spanish language in the federal district courts in San Diego and Albuquerque. Id. at 751:24752:4. Ms. Arguello has worked

Agredano (Mr. Agredano or plaintiff), for breach of contract against the government (government or United States or

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as an interpreter for sixteen years, id. at 752:14, and she has held her California certification for fourteen years, id. at 752:19-24, and her federal certification for more than ten years, id. at 752:25-753:5. The court qualified Ms. Arguello as an interpreter of the Spanish language in the trial. Id. at 753:6-8.

Ms. Gloria Mayne has an undergraduate degree in economics, graduate courses in marketing, communication, and business administration, and a certificate degree from the University of California San Diego in translation and court interpreting. Id. at 7:13-17. She also has numerous certifications from the Judicial Council of California for various courses taken in interpreting and translation. Id. at 7:17-8:1. Ms. Mayne has been certified in the state of California as a court interpreter for almost seventeen years. Id. at 8:7-9. She has been certified as an interpreter by the United States District Courts for five years. Id. at 8:12-14. She has worked as an interpreter in criminal and civil proceedings in California for seventeen years. Id. at 8:9-12. The court qualified Ms. Mayne as an interpreter of the Spanish language in the trial. Id. 10:7-9.

Ms. Ruth Monroy has a law degree from the University of Mexico and is certified as a court interpreter of the Spanish language for the California state courts and the United States District Courts. Id. at 13:10-16. She has been certified as an interpreter for the federal courts for approximately nineteen years. Id. at 14:16-19. The court qualified Ms. Monroy as an interpreter of the Spanish language in the trial. Id. 14:20-22.

defendant). The court heard testimony from nineteen witnesses[3] and received some thirty-nine exhibits in trial.

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[3] For convenient reference, the names, in alphabetical order, and a description of the witnesses upon whose live testimony the court relies in this opinion follow:

Mr. Jayson Ahern is a fact witness for plaintiff. Plaintiff Francisco Javier Rivera Agredano's Witness List, filed Jan. 8, 2008 (Pl.'s Wit.) 6. He currently works as the Deputy Commissioner of the United States Customs and Border Protection (Customs). Tr. 565:18-20. From March 1, 2003 to August 2007, Mr. Ahern worked as the Assistant Commissioner for the Office of Field Operations within Customs. Id. at 566:1-7. From May 2002 to March 2003, he was the Assistant Commissioner for the Office of Field Operations with the United States Customs Service (USCS), which was then reorganized as Customs. Id. at 566:9-13. From January 2001 to May 2002, Mr. Ahern was the Director for the Southern California Customs Management Center in San Diego, id. at 566:15-19, and before that, he was the Port Director for Operations of Customs in Los Angeles, id. at 567:1-2.

Mr. Francisco Javier Rivera Agredano is the plaintiff in this case and a fact witness for plaintiff. Pl.'s Wit. 2. He is forty-five years old and resides in Tijuana, Mexico. Tr. 44:16-19. He works in the printing business as a printer, a job that he has held for twelve years. Id. at 44:20-21; 45:11-12. He has a technical degree in accounting. Id. at 45:15. Mr. Rivera Agredano is married to Maria del Carmen Calderon, with whom he has two daughters. Id. at 44:20-45:4. Mr. Robert Bickers is a fact witness for plaintiff. Pl.'s Wit. 9. He currently works as a Customs and Border

~~Agredano Trial~~

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244:18. He is a Deputy Assistant Port Director for Customs at Otay Mesa. Id. at 185:18-186:8. He first worked as a Customs Inspector for USCS in 1987. Id. at 186:1-2;

Patrol Supervisor for Customs. Tr. 261:13-18. He first began working for the USCS in 1991 as an Inspector at the port of entry. Id. at 261:23-262:5. In 2001, he served as a Supervisor for the Contraband Enforcement Team. Id. at 263:8-13. In his current position, Mr. Bickers trains new inspectors. Id. at 262:23-24.

Dr. Jesus Manuel Cesea Caro is a fact witness for plaintiff. Pl.'s Wit. 14-15. He has worked as a medical doctor for twenty-five years. Tr. 754:18-20. He currently practices in gerontology at the Issste Hospital in Tijuana, Mexico and his private practice. Id. at 754:22; 755:19-20. He studied medicine at the Autonomous University in Guadalajara, Mexico. Id. at 755:5-6. He specialized in family medicine at the Issste Hospital in Tijuana, Mexico and pursued a sub-speciality in gerontology at the Lopez Mateos Hospital in Mexico City, Mexico. Id. at 755:6-9.

Mr. Lawrence Fanning is a fact witness for plaintiff, Pl.'s Wit. 8-9, and a fact witness for defendant, Defendant's Witness List (Def.'s Wit.) 4. He currently works as an Assistant Port Director at Otay Mesa Cargo. Tr. 448:2-3. From October 2000 through 2007, Mr. Fanning served as a Fines and Penalties Officer. Id. at 448:6-19.

Mr. Robert Hood is a fact witness for plaintiff, Pl.'s Wit. 10, and defendant, Tr. 243:16(continued...)

186:12-14. At that time, he worked in secondary inspections and, over the years, he has worked in cargo, commercial, and airport operations. Id. at 186:18-21. He became a Senior Inspector in 1991 and a Supervisory Customs Inspector in 2000. Id. at 187:8-10. In 2004, he became a Supervisory Customs and Border Protection Officer, and he was promoted to Chief Customs and Border Protection Officer. Id. at 187:10-14. In October 2007, Mr. Hood became Deputy Assistant Port Director. Id. at 187:14-16.

Mr. Alfonso Calderon Leon is a fact witness for plaintiff. Pl.'s Wit. 3. He was a plaintiff in this case when the complaint was first filed. Id.; see Complaint (Compl.) ¶ 5. He is thirty nine years old, and he works with Messrs. Agredano and Gabriel Calderon in a print shop. Tr. 94:21-95:1. He has worked at the print shop for approximately fifteen years. Id. at 95:4-5. Mr. Rivera Agredano is married to Mr. Calderon's sister. Id. at 95:6-8.

Mr. Gabriel Calderon Leon is a fact witness for plaintiff. Pl.'s Wit. 15. He is thirty-five years old and works as a printer with his brother-in-law, Mr. Agredano. Tr. 520:8-15. He lives in Tijuana, Baja California, Mexico. Id. at 520:16-17.

Ms. Juliet Calip is a rebuttal witness for defendant. Tr. 676:18-22. She works as a paralegal specialist for U.S. Immigration and Customs Enforcement. Id. at 677:22-24. She has held that position since March 2003. Id. at 678:1. Prior to that, she was a paralegal specialist for USCS for two years. Id. at 678:2-8. In both positions, which are essentially the same jobs (the difference being the reorganization of the USCS within the Department of

Homeland Security (DHS) in 2003), Ms. Calip processes Freedom of Information Act requests. Id. at 678:9-22.

Dr. Miguel Lizarraga is a fact and expert witness for plaintiff. Pl.'s Wit. 14. He works as a medical doctor. Tr. 798:1. He received a degree in a medicine from the University Juarez Autonoma de Tabasco in Mexico. Id. at 798:6-10. Dr. Lizarraga has a certificate in obesity, which was awarded to him by the Association of Obesity in Tijuana, Baja California after attending classes there. Id. at 799:6-17. For the past twenty-four years, he has practiced emergency medicine at the Issste Hospital in Tijuana, Mexico. Id. at 800:2-5. The court qualified Dr. Lizarraga as an expert in general medicine and in the control of obesity. Id. at 800:16-19.

Mr. Carlos Mejia Lopez is a fact witness for plaintiff. Pl.'s Wit. 3-4. He is a criminal law attorney in Tijuana, Mexico. Tr. 129:20; 130:2-4. He was president of the municipality of Tijuana from 2004 to 2007. Id. at 130:25-131:1. He represented Mr. Agredano in the criminal proceedings that followed Mr. Rivera Agredano's arrest by the Mexican border authorities. Id. 140:12-14. Mr. Rivera Agredano's wife is a sister to Mr. Lopez's wife. Id. 140:11.

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Mr. Joseph Marilao is a fact witness for plaintiff. Pl.'s Wit. 6. He is a Supervisory Customs and Border Protection Officer, a position that he has held since 2006. Tr. 398:16-21. He began his employment with USCS in 1992 as an inspector at San Ysidro. Id. at 398:22399:4. After six months, he worked as an inspector at Otay Mesa and then returned to San Ysidro two and a half years later. Id. at 399:5-16. In 1997, he became a Canine Enforcement Officer and, in 2000, he became a Senior Inspector. Id. at

399:20-400:2. In 2002, Mr. Marilao served as a Canine Enforcement Officer again, and he became a Supervisor in the Canine Border Protection unit in 2006. Id. at 400:3-12.

Mr. David John Murphy, Jr. is a fact witness for plaintiff. Pl.'s Wit. 7-8. He currently works as the Director of Field Operations for Customs in the Chicago field office. Tr. 304:24305:1. From 1983 to 1986, he orked for USCS as a customs inspector in San Ysidro, California. Id. at 305:4-14. Heb then worked as a Canine Enforcement Officer in the San Diego field office until 1999 when he ecame Acting Chief of the canine section. Id. at 305:21-306:10. After approximately three montshs, Mr. Murphy was selected as the Enforcement Coordinator for the Southern California Custom[s] Management Center, a position that he held until November 2001. Id. at 306:15-25.

Ms. Aide Nunez is a fact witness for plaintiff. Pl.'s Wit. 12. She is an Inspector with Customs, Tr. 369:6-8, a position she has held since 1995, id. at 369:9-10. In 2001, she served as the Lead Officer in the Contraband Enforcement Team. Id. at 370:19-22.

Mr. Jose Perez is a rebuttal witness for defendant. Tr. 724:23-725:3. Mr. Perez is a Supervisor Chief with Customs, a position that he has held since 2000. Id. at 725:17; 726:2-3. He has been with USCS and Customs for over nineteen years. Id. at 725:24-25.

Mr. Robert Root is a fact witness for plaintiff, Pl.'s Wit. 11, and a fact witness for defendant, Def.'s Wit. 3. Although currently retired, Tr. 642:17, Mr. Root previously was employed by USCS, id. at 642:18-20. Beginning in

October 1983, he served as an Inspector for USCS for three years. Id. at 642:21-643:6. In 1986, he became a Canine Enforcement Officer, a position that he held until 1995 when he became a Canine Enforcement Supervisor. Id. at 643:9-17. Mr. Root served as a Canine Enforcement Supervisor until his retirement in 2007. Id. at 643:19-20.

Dr. Hector Santillana is a fact and expert witness for plaintiff. Pl.'s Wit. 13. He has worked as a psychiatrist for forty years. Tr. 772:21-23. He currently practices in Tijuana, Mexico. Id. at 773:9-12. He earned a degree in psychiatry in 1969. Id. at 773:6-8. From 1965 through 1968, he trained at Hospital Cruz del Norte in Hermosillo Sonora, Mexico, Hospital Cruz del Sur in Oaxaca, Mexico, and Hospital Fray Bernardino Alvarez in Mexico City, Mexico. Id. at 774:13-19. Since that time, he has kept his own office for private practice, and, in 1970 (continued...) Transcript (Tr.) passim. Following trial, the parties filed post-trial briefs and replies: Plaintiff Francisco Javier Rivera Agredano's Post Trial Brief (Pl.'s Br.); Defendant's Posttrial Brief (Def.'s Br.); Plaintiff Francisco Javier Rivera Agredano's Post Trial Reply Brief (Pl.'s Reply); and Defendant's Response to Plaintiff's Post-Trial Brief (Def.'s Reply). In a previous opinion in this case, the court dismissed a related claim brought by plaintiff's brother-in-law, Agredano v. United States (Agredano I), 70 Fed. Cl. 564, 579 (2006), and denied a motion by defendant to dismiss the case in its entirety, id. at 580. The procedural background is described in more detail in Part II.C below.

Plaintiff seeks to recover damages arising from an alleged breach of contract by the government, specifically, U.S. Customs and Border Protection (Customs), in connection with the government's sale of a 1987 Nissan Pathfinder (the Pathfinder) after Mexican authorities stopped

plaintiff in the Pathfinder and arrested him for transporting seventeen kilograms of marijuana found in the Pathfinder. Complaint (Compl.) ¶¶ 7, 1316. Specifically, plaintiff seeks to recover $2,600 for the fair market value of the Pathfinder; $350,000 for attorneys fees incurred by plaintiff during his criminal proceedings in Mexico; $1,254 for the costs and expenses incurred by plaintiff's family in bringing supplies to plaintiff while he was imprisoned; $48,000 for the income plaintiff lost during his imprisonment; $10,000 for the medical bills plaintiff incurred from the injuries and illnesses he sustained as a result of his imprisonment; $80,000 for the medical expenses it is reasonably foreseeable that plaintiff will incur in the future as a result of the injuries and illnesses he sustained as a result of his imprisonment; $12,500 for the psychiatric bills plaintiff has incurred as a result of the psychiatric ailments that his imprisonment caused; $33,000 to $60,000 for psychiatric expenses it is reasonably foreseeable that plaintiff will incur as a result of his imprisonment; and "[e]motional distress damages in an amount which the Court deems reasonable compensation for the arrest and imprisonment of . . . [plaintiff] for a period of 351 days . . . and the residual related problems suffered thereafter." Pl.'s Br. 1-2.

II. Background

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and 1976, he also had two psychiatric clinics in Tijuana, Mexico. Id. at 774:25-775:12. From 1981 to 1984, Dr. Santillana also served as the director of the Issste Hospital. Id. at 775:21-25. In 1996, he was the director of another hospital, Health Department Health Center No. 1. Id. at

775:21-776:1. From 1974 through 1978, Dr. Santillana also served as the president and vice president at the medical university in Tijuana. Id. at 776:19-777:4. The court recognized Dr. Santillana as an expert in psychiatry. Id. at 778:1-2.

A. Plaintiff's Purchase of the Pathfinder and Subsequent Arrest by Mexican Authorities

Plaintiff Agredano currently resides in Tijuana, Mexico with his wife, Maria del Carmen Calderon, and two daughters. Tr. 44:18; 44:22-45:8; 49:13-15. He is in the printing business. Id. at 44:20-21. Alfonso Calderon and Gabriel Calderon, both of whom are brothers to plaintiff's wife, have worked as partners in plaintiff's printing business for the last twelve years. Id. at 45:16-46:13. Plaintiff's business prints items such as brochures, cards, stationary, and envelopes. Id. at 47:22-48:1. Some of plaintiff's clients are ad agencies that conduct work for Burger King in Tijuana and Cali-Max, a supermarket chain. Id. at 48:4-7. Plaintiff has printing equipment in Tijuana that he uses for smaller jobs, but he sometimes rents equipment at other locations in order to perform larger-scale projects. Id. at 47:9-13. Depending on the particular job, plaintiff may rent equipment in either Tijuana or Enseneda, Baja California. Id. at 48:10-16; see Joint Exhibit (JX) 12 (photographs from the evidence offering session) 18.

On September 5, 2001, plaintiff bought the Pathfinder at an auction held by U.S. Customs near San Diego, California. Tr. 50:7-15; 51:6-7; see JX 4 (Conveyance Custody Acceptance Report) 13; JX 7 (plaintiff's title to the Pathfinder) 1. He attended the auction with his brother-in-law and business partner, Gabriel

Calderon, because they each wanted to buy a vehicle. Tr. 54:22-55:5. At the auction, three to four hundred cars were being auctioned, id. at 55:5-6, but plaintiff and Gabriel Calderon decided to buy only one vehicle because "[s]ome of the ones that we were interested in were too expensive, so we weren't able to buy them," id. at 55:6-8. Plaintiff had learned about the auction from an acquaintance, and he was interested in purchasing a vehicle at the auction because "this vehicle [Pathfinder], for example, in Tijuana would cost about $5,000, but at the auction, this vehicle cost - it cost me $2,600." Id. at 51:17-25. Plaintiff understood that the vehicles sold at these auctions were seized vehicles, but he had no knowledge as to where or why the cars had been seized. Id. at 52:2-12. Prior to this particular auction, plaintiff had bought vehicles at U.S. government auctions in the past "several times," and he had never had a problem with any of the vehicles that he had purchased previously. Id. at 51:12-16.

When plaintiff arrived at the auction lot, he completed a Bidder Registration Form that was administered by U.S. Customs Service Support. Id. at 52:22-53:3; JX 6 (Bidder Registration Form) 1. As a condition of participating in the auction, plaintiff signed the Bidder Registration Form, Tr. 53:1-3, which provided, "I agree to comply with the terms of sale contained in the sale catalog for this sale and all future sales I attend," JX 6 (Bidder Registration Form) 1. Plaintiff chose to bid on the Pathfinder because of the vehicle's condition: "[I]t wasn't destroyed on the outside and the interior was intact." Id. at 53:12-13. Plaintiff was unable to open the doors and inspect the interior of the Pathfinder directly, but "[t]he back part was open and inside of that was a gas tank that had been removed and that's how you could look inside, and you could also look inside through the windows." Id. at

53:11-54:7. Gabriel Calderon confirmed at trial that the interior "looked in perfect condition," id. at 524:16, and that the only visible damage to the car was "that the gasoline tank had been removed and it was in the back of the car, in the trunk," id. at 524:10-12. Plaintiff further testified that "the upholstery was complete" in the Pathfinder, as opposed to "[o]ther vehicles [that] had the upholstery torn." Id. at 54:10-12. The fact that the upholstery was complete was important to plaintiff because "with some cars, it would be too expensive to have them be operational again[, a]nd that would raise the cost." Id. at 54:16-18. At some point prior to purchasing the Pathfinder, plaintiff saw a flyer, id. at 56:7-10, that stated the following:

> WARRANTY/GUARANTEE: All merchandise is sold on an "AS IS, WHERE IS" basis, without warranty or guarantee as to condition, fitness to use, or merchantability stated, implied or otherwise. Please bid from your personal observations.

JX 5 (auction flyer) 1. Plaintiff testified that he understood that he was purchasing the vehicle "as is." Tr. 56:11-13. He stated that U.S. Customs "on one occasion said that the vehicles were auctioned as they were, 'as is.' And they made reference to the fact that they didn't assume any responsibility if the engine was shot or the transmission didn't work." Id. at 56:16-20. Plaintiff also testified that he was not concerned about the Pathfinder containing narcotics "[b]ecause I was buying it from a country that has - that I supposed had high technology, the latest technology, and that it was impossible for it to have any problem." Id. at 58:9-12. Plaintiff "felt 100 percent sure, safe" that the Pathfinder had been checked for contraband because he "was buying it from the [U.S.] [g]overnment itself." Id. at

58:20-59:1.

Plaintiff paid for the Pathfinder with cash, id. at 88:9-11, and signed the title to the vehicle, thereby obtaining ownership, JX 7 (Certificate to Obtain Title to a Vehicle) 1. The title stated the following:

> The undersigned Department or Agency of the United States Government certifies that the vehicle described herein, the property of the United States Government, has been transferred this 5th day of September 2001, to the Transferee designated herein; and that this is the first transfer of such vehicle in ordinary trade and commerce subsequent to acquisition thereof by the United States Government.

Id. The title listed the transferor of the vehicle as "U.S. Customs Service" in San Diego and the transferee as "Francisco J. Rivera Agredano." Id. The signer on behalf of the transferor was Guiseppe A. Vaccano, and plaintiff signed as the transferee. Id.

Having obtained possession of the Pathfinder, plaintiff "had to install the gas tank, which was right there in the vehicle itself." Tr. 59:3-4. To plaintiff's knowledge, after purchasing the Pathfinder, no one ever removed the rear seats, took out the paneling on the inside of the interior, or inspected the wheel walls above the tires. Id. at 59:14-25. Plaintiff and Gabriel Calderon drove the Pathfinder without any problems. Id. at 59:7-13.

Some four and one-half months later, on January 24, 2002, at about eleven o'clock at night, plaintiff drove with Alfonso Calderon in the Pathfinder from Enseneda to Tijuana. Id. at 60:21-61:9. They had traveled to Ensenada earlier that day to drop off ten thousand blank sheets of paper to be processed at printing facilities there. Id. at 60:7-12. For their trip home, they packed into the Pathfinder five thousand printed, cardboard-like posters for one of their clients, the supermarket chain Cali-Max. Id. at 61:3-6; 62:10-12.

In order to drive to Tijuana from Ensenada, plaintiff was required to stop at a mandatory checkpoint in the small town of Sauzal. Id. at 61:10-15. "[S]oldiers were inspecting all of the vehicles that came through there," and plaintiff and Alfonso Calderon "were asked where we were heading and what we were carrying." Id. at 62:810. Plaintiff was asked to pull to the side of the road, to get out of the Pathfinder, and to open the trunk. Id. at 62:20-24. The soldiers had a metal antenna "like [a] rod," id. at 63:14, "and they removed some coverings that the back upholstery has and they would stick in that metal antenna," id. at 63:9-11. Plaintiff saw the soldiers stick the metal antenna inside several places in the Pathfinder. Id. at 63:15-17. "When they were poking the side, the soldiers noticed that it would stop on something[,] and they started using force to knock off one of the coverings." Id. at 63:20-22. The soldiers found a package on the right side of the back part of upholstery. Id. at 63:23-64:5. They then asked Alfonso Calderon to get out of the Pathfinder, and "[t]hey started knocking down all of the - the signs, the cardboard signs, and they started breaking up all of the inside." Id. at 64:8-23. The soldiers found additional packages in the upholstery, in the doors, and in the sides of the vehicle. Id. at 64:24-65:3; see JX 12 (photographs from the evidence

offering session) 12.

During the inspection at Sauzal, plaintiff and Alfonso Calderon were restrained by the soldiers, who pointed guns to their heads, touched them with the butt of the guns, and handcuffed them. Tr. 65:23-66:8. Plaintiff injured his right arm "from the excessive movement upwards that they [the soldiers] made when they handcuffed me," and he was hit in the back a few times with the butt of a rifle. Id. at 67:20-68:10. Once the search was complete, plaintiff and Alfonso Calderon were held in a room and unable to make any telephone calls until six or seven o'clock in the morning. Id. at 66:11-19. The next morning, they were taken to an army barracks in Ensenada where "in a hidden manner a soldier let me [plaintiff] call Tijuana." Id. at 66:21-24. Plaintiff called his wife, Carmen. Id. at 66:25-67:1.

By nine o'clock on the morning of January 25, 2002, plaintiff was at the Office of the Federal Attorney General, where he was held in a cell separate from Alfonso Calderon. Id. at 68:17-24. He stayed in that cell for about twelve hours and then went to the court in Ensenada to give a statement. Id. at 69:1; 69:7-11. Plaintiff and Alfonso Calderon were then taken to the penitentiary at Ensenada at about ten or eleven o'clock at night. Id. at 69:8-9.

After arriving at the penitentiary, plaintiff was "totally, completely searched," and his wallet, belt, and shoelaces were taken. Id. at 70:2-4. The prison was constructed entirely of concrete and contained several areas with exposed sewage. Id. at 82:11; 83:19-21. Plaintiff was placed in a cell that contained approximately eleven other persons, id. at 70:9-10, and he remained there for twenty or thirty days, id. at 70:15. He testified that he did not fit in the cell and that he "was left to sit there at the door." Id. at

70:12-13. Because of the small size of the cell, plaintiff was unable to lie down to sleep. Id. at 70:20-23. The only bathroom facility available to plaintiff was a hole in the cell. Id. at 71:1-2. With regard to food and drink, plaintiff was given coffee and water three times a day and fed beans, rice, and soup. Id. at 71:15-24. Plaintiff's family would come and visit but it was difficult to do so "[b]ecause they had to be amongst the other inmates that were there. There [was]n't a special place where you can meet with them." Id. at 74:4-6. Eventually, plaintiff was transferred to another cell that contained forty-five or fifty persons. Id. at 72:17-19. He slept on the floor in that cell, id. at 75:9-11, and spent his days just sitting in the cell without an opportunity to exercise, id. at 74:18-75:14. He was provided with the same food and drink that he had received in the first cell. Id. at 81:19-23. There was only one toilet, which did not flush, located in the cell, and hot water was available for showering only at three or five o'clock in the morning. Id. at 83:1-15. Plaintiff remained in that cell for eleven months. Id. at 75:19-21.

B. Plaintiff's Criminal Proceedings in Mexico

Attorney Carlos Mejia-Lopez, a criminal attorney in Tijuana, Tr. 129:20-130:4, who is married to one of the sisters of plaintiff's wife, id. at140:11, represented plaintiff throughout plaintiff's Mexican criminal proceedings, id. at 140:12-166:24. Mr. Mejia testified that, under Mexican criminal law, once someone is arrested, that person must appear before "the authorities that have jurisdiction over the person who's detained," id. at 131:18-19, within twenty-four hours and give a statement called "a ministerial statement," id. at 131:24-132:8. "It is at that time that the suspect is informed of the charges that he's being charged with." Id. at 132:2-3. "The Ministerial Government Office or District

Attorney's Office then decides whether there are enough elements based on that statement . . . for that detainee to give a second statement before a judge." Id. at 132:11-15. The judge has forty-eight hours in which to accept the detainee's statement, which is known as "the pre-trial statement." Id. at 132:18-20. If the judge decides to pursue the charge, the defendant has three to six days to provide proof of his innocence. Id. at 133:2-22.

Following the search of the Pathfinder by Mexican authorities at Sauzal, plaintiff was charged with drug trafficking and possession of drugs. Id. at 141:10. The first judge was a judge based in Ensenada. Id. at 138:20-24. Mr. Mejia requested from that judge the extended time period within which to produce evidence, and he was granted the sixday period. Id. at 136:8-14. The protocol is that evidence is presented to the court in writing, id. at 133:23-24, and that "[o]ne has to present each means of proof or evidence one by one and has to disclose the purpose of each evidence," id. at 133:24-134:1. "Evidence can be testimony from witnesses, police inspections, expert evidence, documents, [and/or] interviews . . . ." Id. at 134:2-5. The evidence is then presented to a clerk. Id. at 134:22-135:1. "The judge almost never sees the defendant." Id. at 135:25.

Mr. Mejia testified that, following the initial presentation of evidence, if the defendant is indicted, the "instruction period," Tr. 136:22-25, begins, during which "the judge says you have an X amount of months for you to offer more evidence because this evidence is not sufficient," id. at 137:1-3. The evidence includes "statements, documents, eyewitness visits, confrontations, [and/or] reconstructing the scene of the events." Id. at 137:6-8. At the end of the instruction period, a hearing occurs at which

the judge affords the attorney a final opportunity to make a record. Id. at 137:21-138:1. A few days after the hearing, the judge issues a decision. Id. at 138:1-2. If the judge finds the defendant guilty, the defendant may appeal the sentence before a "higher" judge. Id. at 138:11-15. Before the "higher" judge, "you present your written arguments and documents that you may have, but you are not allowed any more to offer any kind of statements or testimony or any visits where you personally go and inspect the scene." Id. at 138:15-19. If that second judge affirms the guilty verdict, the defendant may appeal once more before a panel of three "higher" judges. Id. at 139:10-12.

Plaintiff's initial line of defense was "to try to prove to the judge that they [plaintiff and Alfonso Calderon] were in Ensenada doing a printing job." Id. at 141:1314. Plaintiff did not, when he was arrested, know how the marijuana came to be in the Pathfinder, id. at 141:22-142:1, and "[i]t wasn't until weeks later that we [plaintiff's defense attorneys] realized that the problem had been that that car had been previously detained with drugs in it." Id. at 142:1-3. On March 11, 2002, Mr. Mejia "had a visual inspection evidence offering session in Ensenada" where he "asked the judge to open those packages [the packages seized by the Mexican soldiers at the checkpoint]." Id. at 142:3-6. Mr. Mejia testified, "We opened some packages and the drugs had rotted. It was full of like fungi. It was rotten. It was no good." Id. at 142:6-8; see also JX 12 (photographs from the evidence offering session) 1-8. On that same date, plaintiff's wife presented Mr. Mejia with a document "that had the name Jose Jimenez-Coronel" and "explained there in English that the car had been seized at the San Ysidro Customs area on . . . January 25, 2001." Id. at 142:14-20; see JX 2 (Custody Receipt) 1. Mr. Mejia then contacted the U.S. Customs and Border Patrol in Otay Mesa

for more information about the circumstances leading to the Customs sale of the Pathfinder at the auction, Tr. 143:7-10; 144:8-10, but the Customs officials "[spoke] harshly to me and they'd close the window," id. at 144:1-2. Mr. Mejia then hired a law firm in San Diego to help him obtain the information that he sought from Customs. Id. at 144:24-145:4.

With the help of the law firm in San Diego, which is the law firm to which plaintiff's counsel belongs, Mr. Mejia "obtained some important documents" from Customs. Tr. 145:7. Specifically, plaintiff's counsel sent a Freedom of Information Act (FOIA)/Privacy Act (PA) request to Customs, asking for "photographs of the Pathfinder and the marijuana found in the Pathfinder, and other photographs connected to this seizure file." JX 14 (Customs' response to plaintiff's counsel's FOIA request) 1. After receiving an incomplete response and sending a second FOIA request, see Part III.G.2, Mr. Mejia finally obtained the eight photographs that Customs had taken after having seized the Pathfinder, JX 15 (Customs' response to plaintiff's counsel's FOIA request) 1, 7-24. Mr. Mejia presented all eight photographs to the first judge before she submitted her ruling on the case. Tr. 148:2-5.

Mr. Mejia also offered evidence regarding the condition of the Pathfinder after the Mexican security forces discovered the marijuana. Id. at 150:12-154:11; JX 12 (photographs from the evidence offering session) 9-17. Mr. Mejia testified at trial that:

> [W]e went to do a car inspection because I wanted to see how it was that they had gotten the packages out of the car. Because the soldiers had said that the packages were

> hidden in the car, in the walls. And we went - when we went there to carry out this inspection, we realized that the soldiers had destroyed the whole interior of the car. They destroyed it all. They pulled off all of the upholstery. From the moment that they found the first package, they tore the car up inside entirely, took down all the walls. They didn't hesitate a bit. They found one [package] and they tore everything up, all of it totally. The car was destroyed.

Tr. 150:15-151:2; see JX 12 (photographs of the evidence offering session) 9-17. The posters that plaintiff and Alfonso Calderon had been transporting from California to Tijuana remained in the back of the car. Tr. 152:2-11; JX 12 (photographs from the evidence offering session) 21. Mr. Mejia took pictures of the posters and presented those pictures as additional evidence "because the judge did not believe that the posters had been in the car." Tr. 152:5-7; see JX 12 (photographs from the evidence offering session) 12-22.

Mr. Mejia presented additional photographs of the packages of marijuana. See JX 12 (photographs of the evidence offering session) 27-29. Mr. Mejia testified that the Mexican Federal Attorney General's Office "explained to me that some of the packages were wrapped in plastic - vacuum-packed so that the smell would not go through the packaging and that, because of this, most likely the packages could have been in the car for so long, about a year, and practically not have smelled." Tr. 159:22-160:2. One chemist had inspected the packages on the date that plaintiff and Alfonso Calderon were detained, and Mr. Mejia stated that:

> [H]e [the first chemist] testified before the judge because I asked that he be subpoenaed to give his statement. When I asked him certain things about the drugs, the characteristics of the drugs that he had checked on the date that my guys had been detained, he answered that the drugs that he had inspected in those packages was very dry, that it smelled badly, that it was drugs that had been stored for a long time and that it lacked texture and he was the chemist for the prosecution . . . , yet he was testifying as to things that he had noted the first day when he checked the drugs when they were arrested. . . .
>
> And then, afterwards, I asked for an expert opinion with two other chemists so that they could analyze each package one by one and that's how the three chemists finally arrived at the same conclusion, in that it was old drugs, that it was - they were - it was dry, that it lacked texture, and that it had spoiled
>
> and that these drugs had been in the car for at least a year. And the defendants had been arrested only about a month and a half.[4]

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[4] It appears that "a month and a half," Tr. 161:19, refers to the time elapsed between plaintiff's arrest and the chemist's examination of the drugs. The Pathfinder was seized on January 25, 2001, Compl. ¶ 9, and forfeited to

Id. at 160:20-161:19 (footnote added); see also JX 18 (summary of the first chemist's testimony) 1-2.

Mr. Mejia "offered 57 pieces of evidence, approximately." Tr. 162:24-25. The evidence included "visual inspections, expert chemists' testimony, many statements of witnesses, character witnesses to prove Mr. Rivera and Mr. Calderon's honorability, many reference letters, statements on the part of the soldiers, confrontations with the soldiers, and the soldiers themselves." Id. at 163:1-6. Mr. Mejia testifed that he asked the soldiers, "'When you asked the car to stop, what was the attitude on the part of these men, Rivera and Calderon?' They said that it was normal, that it didn't seem that they were worried or anything because they were convinced that what they were carrying in the car were posters, the posters that they had just printed up." Id. at 163:7-13.

Proceedings took place before the judge in Ensenada up until June 25, 2002. Id. at 138:23-24. On that date, the judge found plaintiff guilty and sentenced plaintiff to five years in jail. Id. at 139:23. The opinion delivered by the judge[5] found plaintiff's defense - that the United States had

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defendant at some point between January 25, 2001 and September 5, 2001, id. at ¶¶ 9-13. Plaintiff purchased the Pathfinder on September 5, 2001. Tr. 50:7-10; 51:6-7. Plaintiff was arrested on January 24, 2002, id. at 60:21-66:13, approximately a year after the Pathfinder was seized.

5

Plaintiff and defendant agreed to admit into evidence Interpreter Mayne's translation of certain sections of an opinion issued in Spanish by the Mexican criminal judge, Tr.

failed adequately to inspect the Pathfinder before selling it to plaintiff - incredible:

> Thus, what the Defense has stated, that precisely the authorities of the United States have not conducted an adequate inspection of the other compartments of the vehicle because the interior of the same was found intact is not credible. Said information, which was provided by the Customs Department, and which was offered as evidence in this criminal case, does not benefit them in any way since[,] independently of what the Defense states, that the U.S. authorities did not conduct

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258:7-259:4, 514:3-13, at this juncture. Interpreter Mayne sight translated and read into the record portions of the opinion designated by plaintiff's attorney. Id. at 516:7-519:5. The court admitted the opinion into evidence under FRE 1005, Tr. 259:13-260:1, which states that "[t]he contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed . . . , may be proved by copy, certified as correct in accordance with [FRE] 902 or testified to be correct by a witness who has compared it with the original," FRE 1005. The opinion is selfauthenticating under FRE 902(3), which provides that a foreign public document is selfauthenticating and the court may treat it "as presumptively authentic without final certification or permit [it] to be evidenced by an attested summary with or without final certification." FRE 902(3). The opinion issued by the Mexican criminal court is a foreign public document; accordingly, no further proof of authenticity other than the document itself was required.

> an exhaustive inspection, it must be noted that they have adequate technology and don't have the need to destroy the vehicle. So, in regard to the documentary evidence presented or submitted, specifically the photographs showing the interior of the vehicle intact, that indicates that it did not have drugs in any other part of the vehicle and that they did not know of their existence.

Id. at 516:14-517:10. The judge opined that the United States officers would not have violated United States law by failing to inspect the Pathfinder:

> This Judge could not establish that an omission has been made on behalf of the Customs authorities in the United States in that they did not inspect adequately the other compartments of the vehicle since, as has been informed, such determination would constitute a violation of the laws of that country.

Id. at 517:13-20. The judge appears to assume that - based on photographic evidence the proper inspections must have been made without destroying the interior. She further appears to assume that the "technology" available to the United States would have permitted a complete search without damaging the interior of the Pathfinder:

> In order to make a determination of something that is a matter for them to resolve, even though in the photographs it

> can be noted that the vehicles interior was intact and thus can be clearly seen, that the same at the moment it was seized by the Government of the United States did not have drugs in any other part and that, on the contrary, that the gasoline tank that had been removed had been the place where they had found drugs at the moment they seized - the United States authorities seized the vehicle and that the inspection was conducted according to their methods, procedures, and technology that they have, without having to destroy a vehicle in order to inspect it.

Id. at 517:20-518:11. The judge had previously refused to credit plaintiff's testimony that he had crossed the United States/Mexican border without incident:

> On the other hand, it is also incredible that the Defendant, Francisco Javier Rivera-Agredano, and witnesses Gabriel Calderon-Leon, as well as the minor, Paulina Lizeth Rivera-Calderon, what they stated, that during the Christmas season they crossed the vehicle in question into the United States in more than one occasion. Since that version is unbelievable since at that time of the year, the inspections are even more exhaustive. In addition, in December of 2001, they were particularly exhaustive since they were at a very recent time after the events of the terrorist attacks to the Twin Towers in New York. Being able to consider that if the drug that was seized had been found in the vehicle, it

could have been easily detected.

Id. at 518:13-519:5.

From June 25, 2002 through September 17, 2002, plaintiff appealed before a magistrate judge in Tijuana. Id. at 138:25-139:5. Mr. Mejia "explained many of the arguments to the magistrate," id. At 164:14-15, who told Mr. Mejia that his "defense was very good," id. at 164:19, because he "offered many pieces of evidence," id. at 164:20-21. However, on September 17, 2002, the magistrate judge affirmed the first judge's sentence in a written ruling. Id. at 165:2-5. The judge ruled that the first judge "had been able to correctly evaluate the evidence, that the judge had done an excellent job." Id. at 165:1012. From September 17, 2002 through January 10, 2003, Mr. Mejia worked on the final appeal for plaintiff, which was held before three judges in Mexicali. Id. at 139:10-17. On January 10, 2003, Mr. Mejia "received a call from Mexicali letting me know that they [plaintiff and Alfonso Calderon] would be released that day." Id. at 166:22-24.

C. Procedural Background

On November 14, 2002, plaintiff and his brother-in-law, Alfonso Calderon Leon, jointly filed a claim in the United States District Court for the Southern District of California pursuant to the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b) and 2671-80, alleging negligence, breach of contract, breach of the implied covenant of good faith and fair dealing, fraud or intentional misrepresentation, negligent misrepresentation, negligent and intentional infliction of emotional distress, and violation of California's Consumer Legal Remedies Act, § 1770(a)(14). Defendant's Motion to

Dismiss Or, in the Alternative, for Summary Judgment (Def.'s Mot. or defendant's motion) App. 20-47. On June 29, 2004, the United States Supreme Court issued its decision in Sosa v. AlvarezMachain, 542 U.S. 692 (2004), finding that a cause of action could not lie under the Federal Tort Claims Act for "any injury suffered in a foreign country, regardless of where the tortious act or omission occurred." Sosa v. Alvarez-Machain, 542 U.S. 692, 712 (2004). On or about November 3, 2004, Compl. ¶ 3, the United States District Court for the Southern District of California granted defendant's motion for summary judgment, finding that the action was barred under the Federal Tort Claims Act because plaintiffs' arrest occurred in Mexico, see Agredano v. United States, No. 02CV2243B, Docket Entry No. 71 (S.D. Cal. Nov. 3, 2004).

Thereafter, plaintiff, Alfonso Calderon, and defendant stipulated to the filing of an amended complaint and to the transfer of the action to this court. Compl. ¶ 3. On February 3, 2005, pursuant to the parties' stipulation, the United States Court for the Southern District of California dismissed plaintiff's and Calderon's claims without prejudice, granted the parties' motion to amend, and transferred the action to this court. Stipulation to Transfer and Dismiss Appeal, Agredano v. United States, No. 05-608, Docket Entry No. 1, Attach. 1 (Fed Cl. June 8, 2005).

On June 17, 2005, plaintiff and Alfonso Calderon filed their amended complaint in this court, alleging breach of warranty, breach of contract, and breach of the covenant of good faith and fair dealing. Compl. passim. On September 30, 2005, defendant filed defendant's motion, alleging that this court lacked jurisdiction because plaintiff's and Alfonso Calderon's claims sound in tort or, alternatively,

that the material facts are not in dispute and that the facts as alleged entitle defendant to judgment as a matter of law. Def.'s Mot. 1-22. In support of its motion for summary judgment, defendant argued (1) that the "as is" clause in the terms of sale precludes the existence of an implied warranty, id. at 12-16; (2) that defendant did not breach the implied covenant of good faith and fair dealing because it did not "specific[ally] inten[d] to injure" plaintiffs or harbor "actual malice" toward them, id. at 16-18 (citing Am-Pro Protective Agency, Inc. v. United States, 281 F.3d 1234, 1239 (Fed. Cir. 2002), and Carolina Tobacco Co. v. Bureau of Customs & Border Prot., 402 F.3d 1345, 1350 (Fed. Cir. 2005)); (3) that the damages plaintiff and Alfonso Calderon alleged were unrecoverable because defendant's breach did not directly cause plaintiffs' harm, id. at 18-20; and (4) that Alfonso Calderon was not a third-party beneficiary of the contract of sale and therefore cannot recover under the contract, id. at 21. On November 14, 2005, plaintiff and Alfonso Calderon filed their Opposition to Defendant USA's Motion to Dismiss or, in the Alternative, for Summary Judgment, with Appendix (Pls.' Resp. or plaintiffs' response), arguing (1) that this court had jurisdiction because defendant's failure to search the vehicle constituted a breach of contract, Pls.' Resp. 15; (2) that the "as is" clause did not preclude the existence of a warranty because its scope was not broad enough to cover the defect plaintiffs allege, id. at 20; (3) that there was a triable issue of material fact as to whether defendant's alleged failure to search the vehicle prior to sale for the purpose of increasing the resale value of the vehicle and defendant's concomitant failure to disclose its actions constitute a breach of the covenant of good faith and fair dealing, id. at 17, 19-21; (4) that the damages sustained were recoverable because they were foreseeable and in fact occurred, id. at 2, 17-18; and (5) that Alfonso Calderon was a third-party beneficiary and accordingly entitled to recover

under the contract, id. at 17. Plaintiff and Calderon further moved the court for "leave to amend the[ir] complaint to allege additional facts to establish the causes of action set forth in the complaint," "if necessary." Id. at 1.

In its Opinion filed March 27, 2006, this court held: (1) that plaintiff and Alfonso Calderon sufficiently established that there were genuine issues of material fact as to whether the context of the sale and the policy to search seized vehicles prior to resale constituted an affirmative representation which would negate the disclaimer and create a warranty; (2) that plaintiff may pursue his allegation that defendant breached the covenant of good faith and fair dealing by proving either that the government failed to conduct an adequate search for the purpose of obtaining a higher resale value for the vehicle at auction or that plaintiffs could not have discovered the hidden contraband in the circumstances of the auction sale and that the government had a policy to search thoroughly any vehicle seized because it contained narcotics, but that the government acted in direct contravention of its stated policy; (3) that plaintiff established the existence of a genuine issue of material fact as to whether damages he sustained in Mexico are recoverable in contract against defendant; (4) that Alfonso Calderon was not a third-party beneficiary of the contract between Agredano, the buyer of the Pathfinder, and defendant, the seller of the Pathfinder; and (5) that plaintiff may not be given leave to amend his complaint. Agredano I, 70 Fed. Cl. at 573-580.

Following telephonic status conferences held with the parties on July 6, 2006 and July 10, 2006, the court assigned-in-part the case to alternative dispute resolution (ADR) proceedings and retained jurisdiction over discovery and other proceedings in the case. See Order of July 10,

2006. On September 1, 2006, the parties requested the ADR judge to suspend proceedings while the parties pursued formal discovery. Defendant's Status Report, Sept. 1, 2006, 1. The ADR judge granted the parties' request to suspend ADR proceedings, Order of Oct. 10, 2006, and this court issued a scheduling order for dispositive briefing, Order of Oct. 30, 2006. In the months that followed, the parties proceeded with the discovery process and again attempted to settle the dispute. See Order of Feb. 9, 2007; Order of Feb. 14, 2007; Order of June 1, 2007. Pursuant to the parties' request, the ADR judge terminated ADR proceedings on July 20, 2007. Order of July 20, 2007. On September 14, 2007, this court set out a pretrial scheduling order in preparation for trial. Order of Sept. 14, 2007. Pursuant to that pretrial scheduling order, the parties filed: Plaintiff Francisco Javier Rivera Agredano's Memorandum of Contentions of Fact and Law (Pl.'s Mem.); Defendant's Memorandum of Contentions of Fact and Law (Def.'s Mem.); Defendant's Witness List (Def.'s Wit.); Defendant's Exhibit List (Def.'s Ex.); Plaintiff Francisco Javier Rivera Agredano's Response and Objections to Defendant's Memorandum of Contentions of Fact and Law; Witness and Exhibit List (Pl.'s Obj.); Plaintiff Francisco Javier Rivera Agredano's Witness List (Pl.'s Wit.); Plaintiff's Exhibit List (Pl.'s Ex.); and defendant's Motion for Leave to File Defendant's Objections to Plaintiff's Revised Witness and Exhibit Lists (Def.'s Obj.). Following a pretrial conference held on January 14, 2008, see Order of Jan. 10, 2008; Order of Jan. 15, 2008, the court held trial on January 28, 2008 through January 31, 2008 in the Federal Building at 880 Front Street, San Diego, California. See Tr. passim.

In its post-trial briefing, the government concedes that a contract existed between plaintiff and defendant when plaintiff purchased the Pathfinder. See Def.'s Br. 1-2, 5

(acknowledging that a contract existed between plaintiff and defendant). However, the government contends that the various contractual theories of breach posited by plaintiff do not apply. See Def.'s Br. passim; Def.'s Reply passim. Out of twenty-one witnesses in total, defendant presented only three witnesses on direct examination and three witnesses on rebuttal. Defendant did not address in its post-trial briefing plaintiff's damages presentation other than to argue generally that compensatory and emotional distress damages are not available at all to plaintiff. Def.'s Br. 22-29; Def.'s Reply 24-27. With several exceptions, the government has chosen to use the forum of a trial and posttrial briefing to present essentially legal arguments. The bulk of the testimony and evidence presented at trial, therefore, was presented by plaintiff in support of his case that a contract existed between plaintiff and defendant, that defendant breached that the terms of that contract when it sold the Pathfinder to plaintiff, and the nature and the amounts of the damages caused by that breach. See Tr. passim.

III. Discussion

A. Legal Standards

1. Jurisdiction

The United States Court of Federal Claims has jurisdiction "to render judgment upon any claim against the United States founded . . . upon any express or implied contract with the United States." 28 U.S.C. § 1491(a)(1) (2006). The court does not have jurisdiction to render judgment upon actions sounding in tort. Id. When a defendant challenges this court's jurisdiction pursuant to Rule 12(b)(1) of the Rules of the United States Court of

Federal Claims (RCFC), the plaintiff bears the burden of proving that jurisdiction is proper. Toxgon Corp. v. BNFL, Inc., 312 F.3d 1379, 1383 (Fed. Cir. 2002); Reynolds v. Army & Air Force Exch. Serv., 846 F.2d 746, 748 (Fed. Cir. 1988); Corrigan v. United States, 68 Fed. Cl. 589, 592 (2005).

The jurisdiction of this court is not limited by the tortious nature of a claim otherwise cognizable in it. See, e.g., Chain Belt Co. v. United States, 115 F. Supp. 701, 711-12 (Ct. Cl. 1953) ("While it is true that this court does not have jurisdiction over claims sounding primarily in tort, an action may be maintained in this court which arises primarily from a contractual undertaking regardless of the fact that the loss resulted from the negligent manner in which defendant performed its contract."). In particular, a claim for tortious breach of contract is not precluded merely because the claim, though rooted in contract, also sounds in tort. Id.; Pratt v. United States, 50 Fed. Cl. 469, 480 (2001) (stating that a claim for tortious breach of contract has been recognized "not [to be] a tort independent of the contract so as to preclude Tucker Act jurisdiction"). Nor does the fact that consequential damages are alleged make the claim a tort claim; rather, an allegation of "consequential damages" presumes that the plaintiffs are proceeding under a contract theory. See, e.g., Bohac v. Dep't of Agric., 239 F.3d 1334, 1339-40 (Fed. Cir. 2001) (recognizing "consequential damages" as a "contract law concept"). As long as the claim "specifically relate[s] to a contractual obligation," it will survive a motion to dismiss. Pratt, 50 Fed. Cl. at 480.

Despite defendant's assertion that the court did not have jurisdiction over this matter, see Def.'s Mot. 1-22 (alleging that this court lacks jurisdiction because plaintiffs' claims sound in tort or, alternatively, that the material facts

are not in dispute and that the facts as alleged entitle defendant to judgment as a matter of law), the court ruled previously that the court does indeed have jurisdiction over the claims brought by plaintiff Agredano, Agredano I, 70 Fed. Cl. at 580, and the court is not persuaded by defendant's arguments to revisit its prior ruling.

2. Implied-in-Fact Warranty

The Court of Federal Claims has jurisdiction over implied-in-fact warranty contractual disputes only, not implied-in-law warranty contractual disputes. See Hercules Inc. v. United States (Hercules), 516 U.S. 417, 423 (1996). "The Tucker Act . . . does not confer jurisdiction of claims against the United States on contracts, implied at law, they must be implied at fact." Lopez v. A.C.&S., Inc. (Lopez), 858 F.2d 712, 714-15 (Fed. Cir. 1988). "Implied-in-fact contracts differ from contracts implied in law (quasi-contracts), where a duty is imposed by operation of law without regard to the intent of the parties." Russell Corp. v. United States, 537 F.2d 474, 482 (Ct. Cl. 1976). The Federal Circuit has held that implied-in-fact contracts are distinguished by "circumstances [that] strongly support[] a factual inference that a warranty was implied." Lopez, 858 F.2d at 715. "An agreement implied in fact is 'founded upon a meeting of minds, which, although not embodied in an express contract, is inferred, as a fact, from conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding.'" Hercules, 516 U.S. at 424 (quoting Baltimore & Ohio R.R. v. United States (Baltimore & Ohio R.R.), 261 U.S. 592, 597 (1923)).

The alleged implied-in-fact warranty in this case is a warranty that the Pathfinder was free of all contraband when defendant sold the Pathfinder to plaintiff. See Pl.'s Br.

12-13. In order to determine whether such a warranty existed and, if it did, whether defendant violated that warranty, the court first will examine defendant's policies regarding searches and seizures of seized vehicles. The court then will examine defendant's and plaintiff's understandings, to be proven by plaintiff, reasonably inferable as facts from the parties' conduct in light of the surrounding circumstances, regarding whether the Pathfinder was free of all contraband. The "meeting of the minds" in this case, therefore, is a mutual, if tacit, understanding, between plaintiff and defendant that the Pathfinder was free of all contraband when defendant sold the Pathfinder to plaintiff.

3. Superior Knowledge

The superior knowledge doctrine provides that, where the government has vital information about the transaction or object of the transaction, knows that its contracting partner has no knowledge of and no reason to obtain such information, misleads its contracting partner as to that information, or fails to put its contracting partner on notice to inquire, and does not provide the relevant information, the government has breached the contract. GAF Corp. v. United States, 932 F.2d 947, 949 (Fed. Cir. 1991). As this court ruled previously, "Where the government has a policy providing that it will search a vehicle prior to resale when there is probable cause to suspect that narcotics are hidden within the vehicle, . . . and where, as here, the vehicle was seized because of the presence of contraband, . . . the government may be found to have misled its contracting partner or, alternatively, failed to put its contracting partner on notice to inquire as to the presence of contraband in the vehicle." Agredano I, 70 Fed. Cl. at 575 (internal citations omitted).

The government has a duty to disclose "superior knowledge . . . which is unknown and reasonably is not available to the contractor." John Massman Contracting Co. v. United States (Massman), 23 Cl. Ct. 24, 32 (1991) (citing Utility Contractors, Inc. v. United States, 8 Cl. Ct. 42, 52 (1985), aff'd, 790 F.2d 90 (Fed. Cir. 1986) (Table)). The government does not, however, have a duty to disclose information that is reasonably available, Massman, 23 Cl. Ct. at 32 (citing L.G. Everist, Inc. v. United States, 231 Ct. Cl. 1013, 1018 (1982)); see also Vann v. United States, 420 F.2d 968, 982 (Ct. Cl. 1970), or that the contractor has an opportunity to learn on its own, see Vann, 420 F.2d at 982 (stating that a contractor who knows or has the opportunity to learn the facts cannot show that it was misled by the contract).

Plaintiff alleges that defendant violated the doctrine of superior knowledge when it did not disclose to plaintiff the alleged existence of a rumored policy in Customs to minimize damage during searches of seized vehicles in order to preserve the resale value of the vehicles at auction. Pl.'s Br. 21. In order to determine whether such a policy existed and whether defendant violated the superior knowledge doctrine, the court will examine the relevant testimony provided by Customs employees at trial.

4. Implied Covenant of Good Faith and Fair Dealing

The covenant of good faith and fair dealing is implied in every contract. Centex Corp. v. United States, 395 F.3d 1283, 1304 (Fed. Cir. 2005). The covenant provides that no party may "act to destroy the reasonable expectations of its contracting partner regarding the fruits of the contract" and "applies to the government just as it does to private parties."

Id.; see Chain Belt Co., 115 F. Supp. at 710-712 (holding that government could not act negligently when performing its obligations under a contract). A contracting party, including the government, may not "depriv[e] its contracting partner[] of a substantial measure of the fruits of the contract and appropriat[e] those fruits, pro tanto, to itself." Centex, 395 F.3d at 1305. Although the "implied covenant of good faith and fair dealing cannot be used to expand a party's contractual duties beyond those in its express contract," the object of the contract is presumed to be subject to the covenant of good faith and fair dealing and the exact prohibited conduct need not be expressed. Id. at 1306.

Plaintiff alleges that defendant violated the covenant of good faith and fair dealing because defendant failed to search the Pathfinder adequately in order to obtain a higher resale value at auction and because defendant acted in direct contravention of its stated policy to remove all contraband from the Pathfinder. Pl.'s Br. 26-27. In order to determine whether defendant curtailed its search of the Pathfinder in an effort to obtain a higher resale value and/or whether defendant acted in direct contravention of its own policy, the court will examine the testimony provided at trial by plaintiff, Alfonso Calderon, several Customs employees, and an employee with the United States Immigration and Customs Enforcement. The court will also consider the numerous directives presented to the court at trial as joint exhibits.

B. [*** Parts III.B.1-4 are redacted except for the last paragraph in Part III.B.4. See n.1. ***]

In the light of the foregoing framework of search

procedures, the court now reviews the evidence concerning the search of the Pathfinder after its seizure by Customs.

C. Inspection and Seizure of the Pathfinder

On January 25, 2001, Customs stopped the Pathfinder at a border patrol facility near the United States border with Mexico. Id. at 401:17-20. One Jose Armando Jimenez Coronel (Mr. Jimenez) was driving the Pathfinder north from Mexico into the United States. Id.; JX 3 (Personal Property Inventory) 1. An initial canine search was conducted at the border patrol facility, and the search indicated the potential presence of illegal narcotics concealed in the vehicle. Tr. 411:9-17; JX 55 ([***]) 1. Customs moved the vehicle to a secondary searching area where Joseph Marilao, Senior Inspector, conducted a [***] and documented his findings. Tr. 401:17-20; 402:11-403:5; JX 1 (Vehicle Inventory) 1. The court heard the testimony of Mr. Marilao at trial.

Mr. Marilao documented his search of the Pathfinder on a form entitled, "[***]." JX 55 ([***]) 1; Tr. 409:15-25. In that form, Mr. Marilao noted that 27.05 kilograms of marijuana was found in the gas tank of the Pathfinder that was driven and owned by Mr. Jiminez. JX 55 ([***]) 1. In the "Narrative" section of the form, Mr. Marilao typed the following:

> ON 01252001 AT APPROXIMATELY 1530 HOURS I WAS INFORMED BY CI [Customs Inspector] WARREN JOHNSON OF A CANINE ALERT ON THE GAS TANK OF A 1987 NISSAN DRIVEN BY THE ABOVE SUBJECT. THE

> CONTRACT MECHANIC WAS DISPATCHED. THE GAS TANK WAS REMOVED BY THE CONTRACT MECHANIC. WHEN THE TANK SENSOR WAS REMOVED I OBSERVED PACKAGES WITH PACKING TAPE, CELLOPHANE, AND VACUUM SEALED INSIDE THE GAS TANK. I REMOVED ONE RANDOMLY SELECTED PACKAGE THAT TESTED POSITIVE FOR MARIJUANA. SECTOR WAS NOTIFIED AND SA [Special Agent] HALL RESPONDED. A TOTAL OF 40 PACKAGES THAT WEIGHED 27.05 KGS WERE REMOVED FROM THE GAS TANK. THE BULK, SAMPLES, VEHICLE, AND REGISTRATION WERE SEIZED ON CF6051'S 2001250490000401,2,3, AND 4 RESPECTIVELY [refers to chain of custody forms, Tr. 415:18-416:8]. TWO BARRELS CONTAINING THE BULK AND A BUCKET CONTAINING THE SAMPLES WERE TURNED OVER TO SCI [Senior Customs Inspector] VAN BROWN FOR LOCKUP IN THE VAULT.

JX 55 ([***]) 1. Mr. Marilao explained at trial that the contract mechanic referred to in the "Narrative" was "American Towing. Tr. 412:11-13. He stated: "Those are the mechanics that we have come down to the port of entry to help remove gas tanks and tires and any other parts that we cannot remove without the use of some sort of special knowledge or skill or tools." Id. at 412:13-17. Mr. Marilao further explained that, once one of the wrapped packages

tested positive for marijuana, Agent Hall, an investigating agent for Customs, responded to conduct the investigation, that is, "to sit down and talk to the violators and anybody else that's in the vehicle." Id. at 414:1-14.

At trial, Mr. Marilao recalled removing the gas tank from the Pathfinder but not having caused any additional damage to the vehicle. Id. at 405:5-406:20. Per search protocol, Mr. Marilao completed a document entitled "[***]." Id. at 403:12-404:15; JX 1 ([***]) 1. Box 21 of the document states the following: "CONDITION OF CONVEYANCE (Note damage, dents, etc. any other defects at time of seizure - body, motor, tires, paint and interior. Give general description." JX 1 ([***]) 1. The only comment made by Mr. Marilao in Box 21 is "tank removed." Id. Mr. Marilao testified that the absence of any other comment probably means that no other damage was caused to the car. Tr. 406:14-407:3. He stated, "I just had the tank removed," id. at 406:18-19, and if he had "removed the seat, [he would have] most likely throw[n] it back in the vehicle," id. at 407:2-3.

Although Mr. Marilao did not note any physical changes to the Pathfinder other than removal of the gas tank, he admitted that damage is "normally" caused to a vehicle during a [***]. Id. at 426:18-21. After damaging a vehicle during a search, such as tearing out the seats or dismantling the side panels, he agreed with plaintiff's counsel that [***]. Id. at 426:23-25. Rather, he agreed that the damaged or removed items [***]. Id. at 426:24.

At some point during the seizure, Mr. Marilao took photographs of the Pathfinder, but he does not recall exactly when he took them. Id. at 416:24-417:12. The photographs were provided to plaintiff in response to his counsel's

second FOIA request and were entered into evidence as JX 15 (Customs' response to plaintiff's counsel's FOIA request) 17-24. See supra Part II.B. [***] id. at 417:6-8 Mr. Marilao's testimony confirmed that the photographs contained in JX 15 (Customs' response to plaintiff's counsel's FOIA request) 17-24 appear to be pictures of the removed gas tank, the packages in the tank, and the exterior and interior of the Pathfinder. Id. at 417:25-418:25.

An additional form that Mr. Marilao filled out at the time of his inspection of the Pathfinder is contained in JX 56 ([***]) 1. Entitled "[***]," this form states that forty packages of marijuana, which were sealed in vacuum seal bags with duct tape, cellophane wrap, and packing tape and weighed 27.05 kilograms, were found in the gas tank. JX 56 ([***]) 1; see also Tr. 419:13-25. The form contains a space entitled "Total time to remove contraband" in which Mr. Marilao wrote "15 minutes" by hand. JX 56 ([***]) 1. Mr. Marilao testified that the fifteen minutes refers to "the time it took me to take the packages out and to weigh them." Tr. 420:7-8.

At trial, plaintiff's counsel questioned Mr. Marilao about his search for narcotics in other areas of the Pathfinder. Id. at 421:15-423:16. Mr. Marilao acknowledged that he has "encountered situations where marijuana is found in more than one location of a vehicle." Id. at 421:16-18. He agreed with plaintiff's counsel's statement that [***]. Id. at 421:20-22.

It is unclear what happened immediately after Mr. Marilao's search of the Pathfinder. No documentary evidence was presented and no witnesses recalled whether the Pathfinder then underwent [***]. At some point after Mr. Marilao's search, however, the FP&F division of

Customs oversaw the towing and subsequent storage of the Pathfinder. Id. at 452:25-453:9. Mr. Fanning, an FP&F Officer, id. at 448:6, testified that "EG&G was the national storage contractor," id. at 453:3-4, that Customs used at the time the Pathfinder was seized, and that American Towing was a subcontractor to EG&G, id. at 453:3-4. EG&G "contracted with American Towing to perform their towing services and their storage services." Id. at 453:8-9.

The involvement of FP&F in the forfeiture process began with receipt of Customs' "[***]," JX 54 ([***]) 1-14, which was written by Special Agent Hall after he received "all the facts concerning the seizure and the individual [Mr. Jimenez]," Tr. 455:5-6. Included in that report is a description of the seizure and information about Mr. Jimenez, JX 54 ([***]) 1-4, a "[***]," id. at 5; see also Tr. 455:21-25, a chain of custody form for the marijuana seized from the Pathfinder, JX 54 ([***]) 6; Tr. 456:2-4, and a seizure report, JX 54 ([***]) 7-14; Tr. 456:5-16.

EG&G prepared a series of documents regarding the Pathfinder when performing its towing and storing responsibilities for Customs. See JX 4 ([***]) passim. EG&G filled out a "[***]" form, JX 4 ([***]) 4, which Mr. Fanning testified is "used to document the condition and inventory of the vehicle," Tr. 463:21-22. Box 15D of that form asks for descriptions of "interior damage" to the upholstery, floor cover, head liner, and other areas of the vehicle. JX 4 ([***]) 4. A handwritten "ok" follows after each item on the lines provided for the descriptions. Id. Mr. Fanning testified that, according to EG&G, the interior of the car was "ok" at the time that EG&G took possession of it. Tr. 464:17-24. Mr. Fanning stated that sometimes EG&G would perform a "very basic maintenance plan," Tr. 471:25, and he testified that, per the "[***]" form included

in JX 4 ([***]) 7, "it looks like the vehicle came in, they did some work to it, and they charged us for that," Tr. 472:13-14; see JX4 ([***]) 7. The work charged for on the form contained in JX4 ([***]) 7 included the following: "Check tire pressures and inflate to specifications;" "Remove trash and perishables from interior and storage compartments;" "Roll windows up;" and "Lock doors." JX4 ([***]) 7.

After the Pathfinder was put into storage, EG&G filled out its "[***]" form. Tr. 475:14-16; see JX4 ([***]) 12. Mr. Fanning testified that the Customs officer, at the seizure of the vehicle, "is required to provide an appraised value that the agency says it's worth X amount of dollars," Tr. 475:18-19, and that "that value is essentially a book value, . . . a Kelley Blue Book or an NADA book that says it's a certain type of car, certain year, certain amount of miles, and those are usually the factors involved," id. at 475:20-24. He further stated:

> Then the contractor is required to do what we call a fair market value and that's what they believe it's going to catch - it would fetch in the marketplace if they were to sell it. And so their number is typically different from ours. As you can see [referring to JX4 ([***]) 12], we appraised it at [$]5,000 in block number five, and then they - they looked at the car and applied their experience plus they looked at any damage, dents, dings, and all that sort of stuff, and then they come up with their value which looks to be - it looks to be that either the - [$]3,050 or the [$]3150.

Id. at 476:7-17. Box 22 of the form lists the "Initial FMV [Fair Market Value]" at $3,050, and Box 23 lists the "Adjusted FMV" at $3,150. JX4 ([***]) 12. Mr. Fanning testified that the initial FMV value represents the value assigned to the vehicle "shortly after they [EG&G] receive the vehicle," Tr. 476:24-25, and that the adjusted FMV represents the value of the vehicle "prior to sale," id. at 477:3. Mr. Fanning was unable to explain why the adjusted FMV was higher than the initial FMV for the Pathfinder. Id. at 478:9-17. Nevertheless, the actual price for which a vehicle sold is the important figure because EG&G then deducts the storage and maintenance costs from the auction proceeds. Id. at 484:4-9. Mr. Fanning testified:

> So, for example, if the car sold for a thousand dollars, then you have the sale of the vehicle minus . . . storage costs and all that other stuff. And then you do the math and then that's what the Government ends up with.

Id. When asked if the government receives less money from the sale of a vehicle when more services are performed on the vehicle by EG&G prior to sale, Mr. Fanning answered, "Absolutely." Id. at 484:15-18.

On September 6, 2001, American Towing, which is a subcontractor to EG&G, moved the Pathfinder to the auction lot, which was controlled by the McCormack Auction Company. JX 4 ([***]) 2. There was no witness testimony that the Pathfinder, once at the auction lot, was [***]. Mr. Fanning testified that it was his understanding that "[***]." Tr. 495:3-6. Additionally, based on testimony by Deputy Hood and Mr. Marilao, it appears to the court that defendant's policy in 2001 was [***]. See id. at

218:11-22; 425:8-426:9. Speaking from his experience as a Canine Officer, Mr. Marilao testified about [***]:

> Q: Okay. And the purpose of the [***] is to search for any drugs that might still be in the vehicles [***]? A: Yes.
> Q: And you personally have found additional drugs in some of the cars [***]; is that correct? A: Yes.
> Q: And you're aware of circumstances where other inspectors have found drugs [***] in the vehicles?
> A: Yes. Usually it's canine officers. I haven't had the experience with the inspectors going down to find other narcotics, but I have heard of that. Q: Okay. So normally [***]? A: Yes.
> Q: Okay. Was it your understanding that the [***] was to try to make sure that the vehicles did not contain drugs when a person thereafter bought them at the auction? A: Yes.

Id. at 425:11-426:9. Mr. Fanning underscored Mr. Marilao's testimony regarding the purpose of the [***]:

> Q: And is the purpose of that [***] to make sure that there were no more narcotics in the vehicles before it was sold? A: Yes.
> Q: If there are narcotics in the vehicle, then Customs won't sell

them; right?
A: At that time, correct.
Q: Is there - is there a time when they will sell cars with narcotics?
A: Well, they'll - I mean, if they - if they - the dog alerts on narcotics, then they'll search the vehicle and if they're satisfied that they've removed all of the narcotics, then we will sell the vehicle. Whether that occurs on the same day, you know, prior to that sale and in time for that vehicle to go to sale or not depends on the situation.
Q: Because the United States doesn't want to sell vehicles that have narcotics in them?
A: That would be a - yes.

Id. at 495:7-25. Mr. Fanning further testified that another purpose of the [***], although not the primary purpose, is to protect the purchasing public. Id. at 496:1-497:20. He stated that "our purpose for searching vehicles is to ensure that we've interdicted and got all of the drugs out of the vehicle," id. at 496:4-7, and that "when we get to point of sale, obviously we want all of that removed out of the vehicle so that when we sell the vehicle, it doesn't have drugs in it," id. at 496:12-15 (emphasis added).

At the auction, the Pathfinder was sold to plaintiff for $2,600. Id. at 51:17-25; JX9 (Disposition Order) 1. EG&G documented the sales price in a form admitted to the court as JX9 (Disposition Order) 1. Tr. 488:9-490:4; see JX9 (Disposition Order) 1.

D. Whether a Contract Arose Between Plaintiff

and Defendant When Plaintiff Purchased the Pathfinder from Defendant

The court previously ruled that a contract did in fact arise between plaintiff and defendant when plaintiff purchased the pathfinder. Agredano I, 70 Fed. Cl. at 571-73. Specifically, the court defined the written portion of the contract as both the document that transferred title of the Pathfinder from defendant to plaintiff and the Bidder Registration Form to which plaintiff agreed by signing. Id. at 571-72. The Bidder Registration Form provided that the signer "'agree[s] to comply with the terms of sale contained in the sale catalog for this sale and all future sales I attend.'" Id. at 567. "The sale catalog state[d,] in pertinent part: 'WARRANTY/GUARANTEE: All merchandise is sold on an "AS IS, WHERE IS" basis, without warranty or guarantee as to condition, fitness to use, or merchantability stated, implied or otherwise. Please bid from your personal observations.'" Id. (discussing what is referred to as the "as is" clause).

The court also held in its Opinion of March 27, 2006 that "the plain meaning of the 'as is' clause limits its scope to the construction, maintenance, and mechanical operation of the vehicle and does not cover a situation in which 'the vehicle had been modified in a way that had no effect on its ability to function for transportation' by 'introduc[ing] an attribute not ordinarily associated with [the vehicle's ability to function for transportation].'" Id. at 70 Fed. Cl. at 572 (quoting Rodriguez v. United States, 69 Fed. Cl. 487, 498 (2006)). Accordingly, the law of the case is that the "as is" clause in the contract does not preclude the existence of a possible implied-in-fact warranty in this case because the "as is" clause does not cover a situation in which defendant sells the Pathfinder with concealed contraband to plaintiff. See

id. The law of the case was further supported by the testimony of Gabriel Calderon, who accompanied plaintiff to the auction lot when plaintiff purchased the Pathfinder, and testified that they were unable to inspect the interior of the car before purchasing it. Tr. 524:5-16. Gabriel Calderon stated that, prior to the auction, "the car was locked," id. at 524:7-8, and that he could only "[see] it [the interior of the Pathfinder] from the outside," id. at 524:8. He "saw that it looked fine, that nothing was broken like other cars," id. at 524:8-10, and that the only irregularity "was that the gasoline tank had been removed and it was in the back of the car, in the trunk," id. at 524:10-12. Other than the gas tank, the Pathfinder "looked in perfect condition." Id. at 524:16.

Plaintiff in fact did not understand the "as is" clause to cover the existence of concealed narcotics in the Pathfinder when he purchased the vehicle. See id. at 56:14-59:1. Indeed, plaintiff testified that he understood the "as is" clause to cover circumstances such as a faulty engine or transmission:

> Q: Were you aware that you were purchasing the vehicle "as is"? A: Yes.
> Q. And what did that - what did you understand "as is" to mean?
> A: Well, they on one occasion said that the vehicles were auctioned as they were, "as is." And they made reference to the fact that they didn't assume any responsibility if the engine was shot or the transmission didn't work.

Id. at 56:11-20.

Even if plaintiff and Gabriel Calderon had been able to inspect the interior of the car, the testimony at trial established that they, as lay people, would have been unlikely to discover the contraband themselves. Robert Bickers, a supervisor for Customs, id. at 261:13-18, trains new inspectors to conduct vehicle searches for Customs, id. at 262:2324. Mr. Bickers testified that one would need training before discovering concealed contraband in a vehicle:

> Q: And does it take a certain amount of training to be able to detect hidden narcotics in the vehicles that were coming through the border? A: Initial training. Then experience is the best knowledge. Q: Is it something you expect a layperson to be able to do? A: After - after some training, yes.
> Q: But they would need some training? A: Yes

Id. at 268:23-269:7. Joseph Marilao, the officer who

conducted the secondary inspection of the Pathfinder, see JX 1 (Vehicle Inventory) 1, also testified that one would need to be trained to discover concealed narcotics in a vehicle:

> Q: And would you agree that thoroughly searching a vehicle for hidden compartments takes a level of specialized training and experience? A: Yes.
> Q: [I]t's not something you expect a layperson to be able to do? A: Yes. That's correct.
> Q: Some of the compartments are really sophisticated?
> A: They can be. Yes.
> Q: And you wouldn't expect a layperson to find something unless it was obvious[,] correct? A: Yes.

Tr. 423:4-16.

At trial, Mr. Ahern stated that the "as is" clause was not related to defendant's responsibility to conduct thorough searches of seized vehicles. He testified that the goal of the policy of Customs to search vehicles was to retrieve "all the narcotics:"

> Q: Did the fact that the vehicles were offered for sale as is, as a policy maker, in your mind did the fact that they're being sold as is relieve the United States of any of its responsibilities to conduct a

> thorough search of the vehicle before the sale?
>
> A: Again, I want to go back to the answer that I've given on what our reasons were for conducting the inspection. The goal, again, that I had set for the people that were within my area of responsibility was to make sure we retrieved all of the narcotics at every opportunity that we had, at the port of entry and certainly as we were out at the seized property locations. That was my goal. . . . [T]he goal that I had set for our officers [was] to make sure that all the narcotics were seized prior to the sale, I mean, it was to give every opportunity for us to retrieve all the narcotics. That is my goal. It was not necessarily to relieve the government, or this organization, or Customs at the time, of any liability. It was to make sure that, again, we seized all the narcotics that may have been present in those vehicles.
>
> Q: So your responsibility stayed the same whether the vehicle was sold as is or not, correct?
>
> A: My goals and the policy direction I set was to retrieve the narcotics.
>
> Q: Right. And the fact that the vehicle was sold as is didn't make a bit of difference to that particular goal? A: That would be correct.

Tr. 597:18-599:1. The evidence at trial is consistent with the court's earlier holding that the "as is" clause does not preclude the existence of an implied-in-fact warranty,

Agredano I, 70 Fed. Cl. at 572, and demonstrates as well that, as a matter of fact, plaintiff could not reasonably have been expected to discover hidden narcotics in the Pathfinder.

E. Whether Defendant Violated an Implied-in-Fact Warranty When It Sold the Pathfinder to Plaintiff

Plaintiff argues that an implied-in-fact warranty existed within the contract that arose between plaintiff and defendant when plaintiff purchased the Pathfinder from defendant. Pl.'s Br. 10. Plaintiff asserts that the implied-in-fact warranty represented that the Pathfinder had been subject "to a reasonable search for contraband before it was sold to the public at the auction sale and that "reasonable efforts had been made to remove narcotics from the seized and forfeited vehicle before it was released for sale to [plaintiff]." Id. Defendant counters that plaintiff has not satisfied his burden in proving the existence of an implied-in-fact warranty. Def.'s Br. 13. Defendant argues that, in order to prove the existence of an implied-in-fact warranty, plaintiff "must prove 'facts that show or suggest in some manner an agreement between the parties, a meeting of the minds and a mutual consent to be bound.'" Id. at 14 (emphasis omitted) (quoting Shaw v. United States, 8 Cl. Ct. 796, 799 (1985)).

1. Whether Defendant Represented That the Pathfinder Was Free of All Contraband

Plaintiff argues that the context of the sale of the Pathfinder "created an affirmative representation that the

[Pathfinder] had been subjected to a reasonable search for contraband." Pl.'s Br. 12. Specifically, plaintiff asserts that it was defendant's responsibility to remove all contraband from the vehicle and that plaintiff's belief that all contraband had been removed was a reasonable presumption because the auction was sponsored by Customs. Id. at 12-13. Defendant counters that plaintiff's "assumption that, because the United States was selling the vehicle, it must be free of all contraband . . . falls far short of establishing facts and circumstances that would evidence a mutual intent to agree to the asserted implied warranty." Def.'s Br. 16.

The officers and agents of Customs are tasked with the duty to identify and remove all contraband from vehicles that cross into the United States. As the court described in Part III.B.2, see supra Part III.B.2, a series of directives tasked the officers and agents of Customs with exactly that duty. JX 39 (U.S. directives) 1-82. Additionally, the uncontroverted testimony of numerous Customs witnesses confirmed that Customs officers and agents were responsible for removing all contraband from vehicles seized at the border. For example, Deputy Hood confirmed that the policy at the San Ysidro port of entry was that the vehicles "were to be free of contraband, we were to remove all the contraband from the vehicle." Tr. 236:21-22. He also testified that getting "all of the drugs out of the vehicle" was "our job." Id. at 208:12-13. Mr. Murphy stated that "we would do our best to make sure that we had searched that vehicle systematically to remove whatever contraband was in the car." Id. at 318:5-7. He further stated that the "hope" was that the contraband would be removed "so it's not there when the vehicle is sold." Id. at 318:10-12. Other employees confirmed that Customs' "goal" was to remove all contraband from the vehicle. See id. at 272:4-13 (Bickers) (confirming that "our goal" was to sell

conveyances that were free of all contraband); 378:16-19 (Nunez) (confirming that she understood that [***] were "to make sure there were no drugs in the vehicles before they were sold"); 383:3-6 (Nunez) (stating that "the point of [***] [was] [to make] sure that we didn't leave no drugs in the vehicle").

Mr. Marilao testified that his responsibility with regard to the Pathfinder was to remove the contraband. Id. at 401:17-402:3. As the "seizing inspector," he was "the one that's responsible for seizing the contraband out of the vehicle." Id. at 401:23-24. When asked what his responsibilities were in the position of seizing inspector, he responded, "To take the contraband out of the vehicle and turn it over to be stored." Id. at 402:2-3. Plaintiff's counsel then asked, "Are there any obligations for searching connected with the seizing inspector role?" Id. at 402:4-5. Mr. Marilao answered, "Yes. . . . They have to go ahead and do the inspection of the vehicle and take all the contraband out of the vehicle." Id. at 402:6-10 (emphasis added). Further, Mr. Marilao testified that the [***] were "to try to make sure that the vehicles did not contain drugs when a person thereafter bought them at the auction." Id. at 426:6-8. Mr. Fanning confirmed Mr. Marilao's understanding of the [***] by agreeing that "the purpose of that [***] [was] to make sure that there were no more narcotics in the vehicles before it was sold." Id. at 495:7-9.

Ms. Nunez, who also works as a Seizing Officer, id. at 369:7-370:22, confirmed Mr. Marilao's understanding of Customs' policy to remove all contraband from a seized and forfeited vehicle, id. at 394:13-16. She testified that the purpose of the policy of removing all contraband from a vehicle was to ensure that the vehicle was not sold with contraband. Id. at 394:5-9 (agreeing with the statement that

"the purpose of [***] was to make sure that when they were sold, there was no packages left in them").

Mr. Root, a Canine Enforcement Supervisor, id. at 643:9-23, also testified that the purpose of [***] was to remove all of the contraband from the vehicles. Id. at 652:11-20. He stated that [***] "to make sure that we removed or got all the contraband out of the vehicles." Id. at 652:13-14. He agreed that another purpose of [***] was "to make sure you have all the narcotics or whatever the contraband may be out of the vehicle before it's sold." Id. at 652:18-20. Mr. Root expanded upon his testimony during cross-examination:

> Q: You testified earlier that you understood that the purpose of [***] was to make sure that the vehicles were free of contraband by the time they were sold or something to that effect. Is that right? A: That's right.
> Q: Why do you understand that to be the policy?
> A: Well, as an officer of the U.S. Customs Service[,] it was one thing we don't want to do is be selling vehicles with contraband still left in them. That would not look good for the Department. In a lot of cases there were thresholds on narcotic weights. I can't recall exactly how they were, but it might be if it's a first time smuggler and there might be a threshold saying that if it's less than 100 pounds of marijuana the federal government won't try the case, or they'll turn it over to the state, or something along those lines, or if it's a second time offense for this individual and then if it's 100 pounds or more then definitely he's going to do a lot more time in

> prison and so forth. So[,] if you've taken marijuana out of a vehicle, and have only gotten like 67 pounds, and you stop let's say at the gas tank and didn't search anything else, this particular smuggler goes to court and that's all he had was 67 pounds, that may have not hit the threshold to keep them in prison longer, if at all. So it's necessary to get everything out of these vehicles if possible because you don't know the consequences of what it could mean for the agent, and the Courts and so forth in the system. That and the fact that I would say it's embarrassing to the Customs Services to, you know, sell a vehicle that has narcotics already in it. I mean, we're supposed to be getting narcotics off the street and not giving it to the public.

Id. at 658:19-660:5 (emphasis added).

According to the documentary evidence before the court and the trial testimony of numerous Customs employees, it is clear to the court that a stated goal of Customs' procedures regarding seized vehicles is to remove all contraband from a vehicle prior to sale. That goal is the actual standard that defendant set for itself. Defendant is responsible for "getting narcotics off the street and not giving it to the public." Id. at 660:4-5. The government has that responsibility because only the government may possess illegal narcotics. Private individuals are barred from possessing illegal narcotics. It is the responsibility of defendant to seize "all" illegal narcotics from vehicles forfeited by private individuals. Defendant's conduct of the sale, in particular, the fact that defendant provided no

warning about the possible presence of narcotics in vehicles, demonstrates defendant's own belief that it had successfully carried out its policy of removing all narcotics.

2. Whether Plaintiff Reasonably Assumed That the Pathfinder Was Free of All Contraband

The court now turns to the other contracting party in the transaction that led to Customs' transferring ownership of the Pathfinder to plaintiff: the plaintiff buyer. Plaintiff argues that he held a subjective belief, "consistent with that of a reasonably prudent person . . . [,] that since the vehicles were being sold by the [United States], they had been searched and did not contain large quantities of narcotics." Pl.'s Br. 12. Indeed, plaintiff testified that, when he purchased the Pathfinder at the auction, he was not concerned that it may contain contraband:

> Q: When you decided to purchase the Pathfinder, did you have a concern that it might still have drugs in it left by the previous owner? A: No.
> Q: Why not?
> A: Because I was buying it from a country that has - that I supposed had high technology, the latest technology, and that it was impossible for it to have any problem.
> Q: What type of technology are you referring to?
> A: Well, the same - you know, when I cross into the United States, there is a great deal of inspection, there are dogs, and then there is a Secondary Inspection. And I imagine that, there, they had equipment to

> check it.
> Q: When you bought the Pathfinder, were you under the impression that it had been checked for contraband or drugs? A: I felt 100 percent sure, safe. Q: Why?
> A: Because what I just said, that I was buying it from the [U.S.] Government itself.

Tr. 58:4-59:1. Plaintiff also testified that no announcements or warnings regarding the vehicles' seizure histories or potential to contain contraband were made prior to the auction. Id. at 52:19-21.

Gabriel Calderon, who was with plaintiff when he bought the Pathfinder, testified that he had a similar understanding to that of plaintiff:

> Q: When you were at the auction, did you have an understanding of where the vehicles had come from?
> A: It was my understanding that the cars had been confiscated or seized by the Government of the United States.
> Q: Did you know anything about the history of the Pathfinder? A: No, never.
> Q: Were you worried that it might have drugs in it? A: No.
> Q: And why not?
> A: Well, because if the Government of the United States was selling it, it was

> logical that it had been thoroughly inspected.

Id. at 525:21-526:10.

The materials distributed to potential buyers at the auction identified the auction as a Customs-sponsored event. Customs itself advertised the auction as a Customs-affiliated event. See JX 5 (auction flyer) 1. The flyer used to announce the auction was entitled "U.S. Customs & Combined Agency Public Vehicle Auction." Id. Further, the bidder registration form, which was provided to potential and actual purchasers, was entitled "EG&G Technical Services Inc., U.S. Customs Service Support, Bidder Registration Form." JX 6 (Bidder Registration Form) 1. The document that transferred title from Customs to the purchaser, the "Certificate to Obtain Title to a Vehicle," JX 7 (Certificate to Obtain Title to a Vehicle) 1, identified defendant as the owner of the vehicle until transfer of title is complete:

> The undersigned Department or Agency of the United States Government certifies that the vehicle described herein, the property of the United States Government, has been transferred this 5th day of September 2001, to the Transferee designated herein; and that this is the first transfer of such vehicle in ordinary trade and commerce subsequent to acquisition thereof by the United States Government.

Id. (emphasis added). The back of that same document reiterates that the vehicle is government property prior to

transfer to the purchaser: "This certificate constitutes an official transfer of the vehicle described hereon, and formally evidences its release from the custody of the United States Government to the designated transferee." Id. at 2 (emphasis added).

Plaintiff demonstrated at trial that he believed that the Pathfinder was in fact free of contraband when he bought it, Tr. 58:4-59:1, and Gabriel Calderon confirmed that belief, id. at 525:21-526:10. The court determines that plaintiff's belief was reasonable. By selling the Pathfinder, which then belonged to the United States government, see JX 7 (Certificate to Obtain Title to a Vehicle) 1-2, at an auction sponsored by the United States government, JX 5 (auction flyer) 1, defendant represented to potential buyers that the Pathfinder did not contain any contraband. Because defendant works to remove illegal narcotics from the hands and property of private individuals and because only defendant may possess illegal narcotics, it was reasonable for plaintiff to assume as a fact that defendant would not sell a vehicle containing illegal narcotics to a private individual.

An implied-in-fact warranty is "founded upon a meeting of minds, which, although not embodied in an express contract, is inferred, as a fact, from conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding." Baltimore & Ohio R.R., 261 U.S. at 597. In Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp. (Ryan), 350 U.S. 124 (1956), the United States Supreme Court held that an implied-in-fact warranty existed when the petitioner stevedoring contractor agreed to perform all of the respondent shipowner's stevedoring operations without signing a formal stevedoring contract or an express indemnity agreement. Ryan, 350 U.S. at 126, 1. When one of the shipowner's longshoreman

severely injured his leg - while unloading cargo that the stevedoring contractor had loaded onto the ship - and subsequently sued the shipowner, the shipowner filed suit against the stevedoring contractor for indemnification. Id. at 12628. The Supreme Court held that the parties' "uncontroverted agreement to perform all of the shipowner's stevedoring operations at the time and place where the cargo in question was loaded . . . necessarily includes [the stevedoring contractor's] obligation not only to stow the [cargo], but to stow [it] properly and safely." Id. at 133 (emphasis added). The Court further stated:

> Competency and safety of stowage are inescapable elements of the service undertaken. This obligation is not a quasi-contractual obligation implied in law or arising out of a noncontractual relationship. It is of the essence of petitioner's stevedoring contract.

Id. (emphasis added).

When plaintiff purchased the Pathfinder from defendant, both parties had the same expectation: that the Pathfinder was free of all contraband. That mutual and common expectation is the "meeting of minds" within this contract. Much like the parties in Ryan, who expected the stevedoring contractor not only to load the shipowner's ship but to load it "properly and safely," Ryan, 350 U.S. at 133, the parties in this case expected to transfer ownership of the Pathfinder free of any contraband. Defendant's conduct that showed its "tacit understanding" of this warranty was repeatedly demonstrated by defendant's written policies, by the testimony provided by defendant's agents, and by the fact that the circumstances of the sale suggested absolutely

no uncertainty on the part of the government that the Pathfinder was free of contraband. That documentary and testimonial evidence proved that the "purpose" of defendant's search procedures was to remove all contraband from seized and forfeited vehicles prior to sale. Selling a vehicle that contains illegal narcotics to a private individual after having seized the vehicle and having been in possession of the illegal narcotics contradicts defendant's stated goal of removing "all" contraband. The conduct of the sale - with no warning to the public or opportunity for the public to inspect the vehicles - makes clear that defendant assumed as a fact that the vehicles it sold were free of narcotics. Defendant has a duty to "[get] narcotics off the street and [not to give] it to the public." Tr. 660:4-5. Plaintiff was reasonable in assuming, as a fact, that the Pathfinder did not contain any contraband because, as a private individual, it is illegal for him to possess contraband. Defendant did not meet its own standard of clearing "all" contraband from the Pathfinder before selling the Pathfinder to plaintiff. Defendant violated the implied-in-fact warranty, evidenced by the circumstances of the sale, that the Pathfinder was free of contraband when it sold the Pathfinder with seventeen kilograms of marijuana to plaintiff.

F. Whether Defendant Violated the Doctrine of Superior Knowledge and Breached Its Contract with Plaintiff

Plaintiff argues that defendant violated the doctrine of superior knowledge when it did not disclose to plaintiff that a "policy/rumor/suggestion to 'minimize damage' during searches to preserve 'resale value' (which increased the risk that 'large loads' of drugs remained in the vehicles at the time of sale)" allegedly existed. Pl.'s Br. 21. Plaintiff asserts that, had the government disclosed this information

to plaintiff, "the value of the conveyance would have been decreased but [plaintiff] would have been aware of the risk and taken proper steps to protect himself if he decided to proceed with the sale." Id. Defendant counters that the doctrine of superior knowledge is inapplicable to this case: it claims that plaintiff has not proven the government's withholding of a fact because plaintiff failed to prove that a policy to curtail searches in fact existed. Def.'s Reply 9. Defendant further argues that the doctrine is strictly limited to the disclosure of facts that affect performance costs and that "the only cost component of the contract [in this case] is the price of the property purchased." Id.

Plaintiff presents the testimony of Mr. Marilao, the seizing officer who searched the Pathfinder, as evidence that defendant had a policy to minimize damage during its vehicle searches in order to obtain a high resale value of those vehicles at auction. During direct examination by plaintiff's counsel, Mr. Marilao stated that there was a policy at the San Ysidro point of entry to minimize damage to seized vehicles for purposes of reselling the vehicles at the auctions. Tr. 427:23-429:9. He agreed with plaintiff's counsel that his supervisors had instructed him and other seizing officers "to minimize the damage for a vehicle for resale purposes." Id. at 428:21-22; see also id. at 429:22. He also agreed with plaintiff's counsel's statement that "the inspectors were told that they - that when they inspect the vehicles, not to cause extensive damage because the vehicles were going to go into auction." Id. at 429:1-4. Mr. Marilao admitted that "because this [minimizing damage] would make the car worth more at auction, sometimes [he] would do [his] best to minimize the damage during a search." Id. at 429:6-8. During cross-examination, Mr. Marilao reiterated that the policy was a "policy to minimize damages for purposes of resale," not "a policy simply to minimize damage." Id. at

431:11-13. However, he then appeared to contradict his earlier statements, testifying that the officers' attempts to minimize damage to the vehicles was "[n]ot necessarily," id. at 431:17, always for the purposes of resale. He further stated that he did not "curtail [his] own searches pursuant to this policy to a degree where [he was] skipping things that [he] would normally do," id. at 432:17-19, and that, if he had to cut up a seat in order to search for contraband, he would do so, id. at 432:21-23.

As discussed in Part III.A.3, the superior knowledge doctrine provides that, where the government has vital information about the transaction or object of the transaction, knows that its contracting partner has no knowledge of and no reason to obtain such information, misleads its contracting partner as to that information, or fails to put its contracting partner on notice to inquire, and does not provide the relevant information, the government has breached the contract. GAF Corp., 932 F.2d at 949.

However, not all information that could be or is withheld by a party would implicate the superior knowledge doctrine. In Hercules, the Federal Circuit noted that the doctrine concerns only "the withholding of superior knowledge that makes it more difficult to perform under the terms of the contract at issue." Hercules, 24 F.3d at 197 (emphasis added). Hercules involved plaintiff chemical companies seeking indemnification for a settlement suit into which they had entered with veterans allegedly injured by the use of Agent Orange during the Vietnam War. Id. at 191-93. Because the government had knowledge of the health risks associated with chemicals contained in Agent Orange, the plaintiffs argued, the government should indemnify the plaintiffs for the costs and attorneys fees of litigating the veterans' suit. Id. at 193-94. The Federal

Circuit ruled against the Hercules plaintiffs because it found that "nothing the government did or failed to do had any impact upon [plaintiffs'] production of Agent Orange." Id. at 197.

In Helene Curtis Industries, Inc. v. United States (Helene Curtis), 312 F.2d 774 (Ct. Cl. 1963), the Court of Claims, the predecessor to this court, held that the defendant United States Army, did violate the doctrine of superior knowledge when it withheld specialized knowledge of the manufacturing method necessary to produce chlormelamine, a disinfectant chlorine powder, and about the product itself. Helene Curtis, 312 F.2d at 777-78. The defendant had solicited a bid for chlormelamine to be used as a disinfectant for army gear in the Korean War, id. at 775-76, without providing certain information about the product and the methods used to manufacture it, id. at 778. The plaintiff, who had submitted the lowest bid based upon a belief that chlormelamine could be made simply by mixing various ingredients, was awarded the contract and incurred $90,000 more in costs because it discovered that grinding was necessary to make the product meet defendant's solubility specifications. Id. at 776. The Court of Claims ruled in favor of the plaintiff and held that the government failed to disclose its knowledge of the difficulties in producing chlormelamine and that it had even implied that grinding would not be necessary. Id. at 778.

Similarly, in Hardeman-Monier-Hutcherson v. United States (Hardeman), 458 F.2d 1364 (Ct. Cl. 1972), the Claims Court held that defendant, the United States Navy, violated the doctrine of superior knowledge when it awarded a contract to the plaintiff contractor that included construction of a pier at a site marred by "unpleasantly rough sea[s]." Hardeman, 458 F.2d at 1365, 1372. When

the plaintiff had submitted its bid to defendant, the plaintiff had requested copies of the defendant's reports that divulged the statistics for the tidal streams and winds of the proposed pier's location. Id. at 1367. The defendant denied the plaintiff's request, id., and "[t]he invitation for bids contained no affirmative representation as to the winds, tide, currents or sea condition other than the statement that there were occasional cyclones," id. at 1369. Because the plaintiff did not have time within the bidding period to perform an adequate investigation of the proposed pier site, the plaintiff underestimated the amount of time it would take to complete performance of the contract. Id. at 1367-68. The Court of Claims found that the defendant had a duty to disclose its superior knowledge regarding the conditions at the proposed pier site, and it held that the defendant's failure to disclose that knowledge constituted a breach of contract. Id. at 1372.

It is not clear, however, that the superior knowledge doctrine addresses information of the type alleged by plaintiff to exist in this case. The knowledge that the defendants withheld in Helene Curtis and Hardeman involved specialized, scientific information that was determined and documented by the government. See Helene Curtis, 312 F.2d at 77778; Hardeman, 458 F.2d at 1365-66.

Even if the superior knowledge doctrine were applicable to the information allegedly withheld in this case, plaintiff was unable to produce any evidence demonstrating that the rumored policy to minimize searches for the sake of resale values was an official policy of Customs or even that the rumor was widespread within Customs. On the contrary, several Customs agents testified that no such policy existed. Chief Jose Perez, a Supervisor within Customs, Tr. 725:17, stated at trial that he never heard an

instruction at San Ysidero to curtail searches in order to increase the resale prices of vehicles, that he never heard a rumor to that effect, and that he never instructed anyone to curtail their searches for that reason, id. at 728:21-729:10. He further specified that, as Supervisor to Mr. Marilao, he never "instructed Joseph Marilao to curtail his searches so that the resale prices at auction would be higher." Id. at 729:11-14. He went on to say:

> [Customs] would never say well, we're concerned about the resale value of a seized vehicle so don't search it, or don't do this, or don't do that. Our job is to get all the drugs out of a vehicle by whatever means possible. . . . The goal is to get all the drugs out of a vehicle. I could say that I don't think too many Customs Officers . . . would care at all what the resale value of a vehicle would or would not be.

Id. at 729:19-730:24. Deputy Hood also testified that he has never heard of defendant's "engag[ing] in a practice of curtailing its searches of seized vehicles in order to increase the resale prices of those vehicles when they were sold at public auction," id. at 243:23244:1, that he had never been instructed to curtail searches for that reason, id. at 244:4-8, and that he himself had never curtailed the searches of vehicles for any reason, id. at 244:9-16. Additionally, Mr. Bickers denied ever hearing the rumor, id. at 282:3, and Mr. Root stated that he "never" heard that rumor, id. at 663:19. Mr. Root further testified that "[m]oney [the resale price] was never an issue," id. at 664:4-5, and that he does not care for what price a vehicle sells because his "job is to make sure that the narcotics everywhere in that vehicle wherever it's found is removed before it's sold at auction," id. at

664:18-21.

Even if the superior knowledge doctrine were applicable, plaintiff did not prove facts sufficient to support a claim that defendant violated the doctrine of superior knowledge. Because plaintiff failed to prove that defendant had a policy to "'minimize damage' during searches to preserve 'resale value,'" Pl.'s Br. 21, much less withheld knowledge of such policy, the court finds that the doctrine of superior knowledge is inapplicable to this case.

G. Whether Defendant Violated the Implied Covenant of Good Faith and Fair Dealing When It Sold the Pathfinder to Plaintiff

In Agredano I, when defendant moved for summary judgment as to plaintiff's claim that defendant violated the implied covenant of good faith and fair dealing, the court ruled:

> The court declines to grant defendant's motion for summary judgment as to its claim that defendant did not breach the covenant of good faith and fair dealing. It may be that plaintiffs can prove that the government failed to conduct an adequate search for the purpose of obtaining a higher resale value for the vehicle at auction. This could be a case of the government's appropriating profits to itself at the expense of its contracting partner in direct contravention of the covenant of good faith and fair dealing. See Centex, 395 F.3d at 1305.

> Or, if plaintiffs prove that they could not have discovered the hidden contraband in the circumstances of the auction sale, and that the government had a policy to search thoroughly any vehicles seized because they contained narcotics, but that the government acted in direct contravention of its stated policy, plaintiffs may be able to show that the government had a duty to notify plaintiffs of the government's failure to search the vehicle thoroughly or a responsibility to put plaintiffs on notice that it would be their responsibility to inspect the vehicle for contraband and to allow them the opportunity to conduct a meaningful inspection.

Agredano I, 70 Fed. Cl. at 574.

1. Whether Defendant Had a Policy to Curtail Searches of Vehicles In Order to Obtain a Higher Resale Value

Plaintiff argues that defendant violated the covenant of good faith and fair dealing because defendant "failed to conduct an adequate search of the Pathfinder . . . [f]or the purpose of obtaining a higher resale value for the vehicle at auction." Pl.'s Br. 26 (emphasis omitted). However, as discussed in connection with plaintiff's claim under the superior knowledge doctrine in Part III.F above, plaintiff failed to prove the existence of a policy of minimizing damage to obtain a higher resale value or that such a motive affected the search of the Pathfinder. See supra Part III.F. The court notes that several Customs agents, including Customs inspectors and directors, testified that, had the Pathfinder undergone a thorough, [***], the marijuana left in

the Pathfinder would have been discovered. See Tr. 276:20-24 (Bickers) ("Q: And if there were 35 pounds of marijuana on the interior of the car, do you - would you expect that it should be found during that process? A: Thirty-five pounds of marijuana should be found during that process. Yes."); id. at 333:22-334:1 (Murphy) ("Q: How about 35 pounds of marijuana; would you expect that a thorough inspection of the interior to detect that? A: I would hope that if you followed all the procedures, that you would find that amount. Yes."); id. at 379:15-22 (Nunez) ("Q: Would you expect that if all of the searches were done in the way you were trained on the Pathfinder in this case, that - and if the Pathfinder had 37 pounds of marijuana in it at the time of the search, that it would be found by the inspectors if they had done all the searches the way they were supposed to be done? A: Correct."); id. at 237:25-238:7 (Hood) ("Q: If a [***] is conducted thoroughly, would you expect that they would find an amount of marijuana that was, say, 35 pounds? . . . . [A:] I would expect that I would find it. I don't know about other officers. I would expect I would. I can only speak for myself."); id. at 605:22-606:2 (Ahern) ("Q: What if the marijuana was in the door, and the wheel wells and under the seat? Would those be areas you would expect them to find if they were conducting a thorough and adequate [***]? A: I would think so, yes.").

The court does not know how Customs missed the contraband in the Pathfinder that resulted in plaintiff's arrest, incarceration, and injuries. However, the court cannot conclude, based on the preponderance of the credible evidence, that the reason for the failure was the government's intent to obtain a higher resale value for the Pathfinder. The preponderance of the evidence presented at trial simply does not support the allegation. See supra Part

III.F. Thus, the court cannot find a violation of the covenant of good faith and fear dealing based on the allegation that the government failed to conduct an adequate search for the purpose of obtaining a higher resale value.

2. Whether Defendant Acted in Direct Contravention of Its Stated Policy

The court now turns to plaintiff's alternative theory that defendant may have violated the implied covenant of good faith and fair dealing if plaintiff proves: 1) that he could not have discovered the hidden contraband himself; 2) that the government had a policy to search thoroughly any vehicles seized because they contained narcotics; and 3) that the government acted in direct contravention of its stated policy. With regard to the first element, it is clear to the court that it was impossible for plaintiff to discover the contraband himself prior to his purchase of the Pathfinder. See supra Part III.D. When plaintiff first saw the Pathfinder on the auction lot, and before he decided to bid on it, the Pathfinder was locked and plaintiff was unable to open the doors. Tr. 53:14-16. The first time plaintiff was able to get inside of the Pathfinder was "[a] day after it was bought." Id. at 55:12. Gabriel Calderon, who accompanied plaintiff to the auction, confirmed plaintiff's testimony that it was impossible to inspect the interior of the car. Id. at 524:5-527:11. He stated that "the car was locked," id. at 524:7-8, when he and plaintiff viewed it before bidding at the auction. He further stated that he was not able to open the doors to

> the Pathfinder and to get inside of it until the day after plaintiff purchased it. Id. at 526:21-23.

Furthermore, even if plaintiff had been able to inspect the interior of the Pathfinder prior to bidding on it at the auction, it is highly unlikely that, as a layperson with no training in searching for contraband in seized vehicles, plaintiff could have discovered the narcotics himself. See supra Part III.D. Several Customs agents testified that no layperson could discover hidden contraband within a vehicle. Mr. Bickers agreed that training and experience were required in order "to detect hidden narcotics in the vehicles that were coming through the border," Tr. 268:24-25, and that a layperson would only be able to detect hidden narcotics in a vehicle "after some training," Tr. 269:5. Mr. Marilao confirmed Mr. Bickers' testimony by agreeing "that thoroughly searching a vehicle for hidden compartments takes a level of specialized training and experience," id. at 423:4-6, which is something that one cannot "expect a layperson to be able to do," id. at 423:8-9. Accordingly, the court finds that the first element of its inquiry, that plaintiff could not have discovered the contraband on his own, is satisfied.

With regard to the second element of the court's inquiry, "that the government had a policy to search thoroughly any vehicles seized because they contained narcotics," Agredano I, 70 Fed. Cl. at 574, the court has already determined that defendant certainly had such a policy, see supra Part III.B. Thus, the court now turns to the third and final inquiry: whether the government acted in direct contravention of its stated policy.

The Federal Circuit held in Centex that the government breached a contract with corporate plaintiffs when Congress enacted certain tax legislation. Centex, 395 F.3d at 1314. The case arose out of the savings and loans crisis in which "[t]he government sought to mitigate the

effects of the crisis in the industry by inducing healthy financial institutions to take over troubled [savings and loan associations] in order to avert their collapse." Id. at 1287. The plaintiffs had entered into one such takeover arrangement that provided that the government would provide tax benefits to the plaintiffs in consideration of their bailing out troubled associations. Id. at 1287-88. Soon thereafter, Congress enacted new tax legislation that "had the effect of disallowing such institutions from claiming deductions for the built-in losses on assets covered by the . . . assistance agreements." Id. at 1289. The Federal Circuit affirmed the ruling by the Court of Federal Claims, holding that "an implied promise of good faith and fair dealing . . . was breached when Congress passed the targeted legislation that effectively appropriated to the government a substantial portion of the benefits that the plaintiffs reasonably expected from the operation of the Agreement." Id. at 1314.

Plaintiff sets forth two allegations in support of his claim that defendant acted in direct contravention of its stated policy. Pl.'s Br. 26-27. First, plaintiff points to the alleged rumor that seizing officers were directed to minimize damage during searches of seized vehicles in order to retain the resale value of the vehicles. Id. at 26. Second, plaintiff claims that the difficulties he and his attorneys faced when requesting the photographs taken by Customs after the Pathfinder had been seized demonstrate that "the government, knowingly and without reasonable justification, withheld relevant information from its contracting partner ([plaintiff])." Id. at 27.

The court has already examined plaintiff's claim regarding the alleged rumor and determined that the documentary evidence presented at trial and the testimony provided by numerous witnesses do not support plaintiff's

claims. See supra Part III.F. Unlike the circumstances in Centex, in which the defendant performed an action, enacting new tax legislation, that directly contravened what it had promised to the Centex plaintiffs, see Centex, 395 F.3d at 1314, the allegation of an unsubstantiated rumor does not rise to the level of direct contravention. The court therefore concludes that the possible existence of an alleged rumor to minimize damage to vehicles during searches is not an action taken by defendant that directly contravenes defendant's stated policy to search all vehicles thoroughly.

With regard to plaintiff's allegation that defendant withheld evidence from plaintiff by not initially submitting to plaintiff all of the photographs of the Pathfinder taken by Customs, the court understands how plaintiff's suspicions could have arisen. When plaintiff's criminal attorney in Mexico was unable to retrieve photographs of the Pathfinder from the government, he enlisted the assistance of plaintiff's counsel in the United States. Tr. 144:24-145:4; see JX 60 (Mr. Mejia's FOIA request) 1-10. On April 5, 2002, plaintiff's counsel sent a letter to the Office of the Special Agent in Charge, c/o Freedom of Information Act/Privacy Act. JX 59 (plaintiff's counsel's FOIA request) 1-4. The letter requested "any and all photographs taken in connection with the seizure of a 1987 Nissan Pathfinder . . . from Jose Jimenez Coronel in January of 2001 as further described in the Custody Receipt for Retained or Seized Property attached hereto." Id. at 1. On April 8, 2002, Customs responded to plaintiff's counsel with a letter that included the following paragraph:

> There exists eight (8) pictures in our file. Pursuant to the above referenced telephone conversation, please be advised that six (6) enclosed pictures are provided in response to your request. One (1)

> picture is non-responsive, and one (1) picture is being withheld pursuant to 5 U.S.C. [§] 552(b)(7)(c).

JX 14 (Response to plaintiff's counsel's FOIA request) 1. Juliet Calip, a paralegal specialist for the United States Immigration and Customs Enforcement (ICE), testified that she had prepared that response to plaintiff's counsel's initial FOIA request. Tr. 682:17-23. She explained that 5 U.S.C. § 552(b)(7)(c) concerns "invasion of privacy," id. at 684:8-10, and that she withheld one of the photographs, which depicted an interior view of the Pathfinder from the passenger's side, for the reason that "a person's face" was in it, id. at 690:24-25; see JX 15 (Response to Mr. Mejia's FOIA request) 20 (showing the redacted version of the photograph with the person's face blacked out). She stated that she found the other photograph, which depicted an entirely interior view of the back seat of the Pathfinder, see JX 15 (Response to Mr. Mejia's FOIA request) 24, non-responsive to plaintiff's counsel's request because "[t]here were no pictures of any drugs in that picture, and it was asking about pictures of drugs in a wheel well and in the car, and that exact picture had pictures of items that were not drugs, and they were inside a car, so it was determined as non[-]responsive," Tr. 684:14-19.

The court does not understand why the photograph of the back seat of the Pathfinder was deemed non-responsive to plaintiff's counsel's FOIA request. The letter sent by plaintiff's counsel requested the following:

> Without waiving any rights to seek additional documentation in the future, this is to request a copy of any photographs of the Pathfinder, the marijuana found in the Pathfinder, or any

> other photographs from the above referenced seizure file.

JX 59 (plaintiff's counsel's FOIA request) 1 (emphasis added). The court understands that sentence to request clearly three types of photographs: 1) any photographs of the Pathfinder; 2) any photographs of the marijuana found in the Pathfinder; and 3) any other photographs contained in the seizure file maintained by Customs. Ms. Calip testified that eight photographs were contained in the seizure file, Tr. 704:16-18, yet she only sent six photographs to plaintiff's counsel, JX 14 (Response to plaintiff's counsel's FOIA request) 4-9.

Ms. Calip did not send the two additional photographs, which depicted the interior of the Pathfinder, to plaintiff's counsel until a local news anchorwoman made a similar FOIA request. Tr. 690:15-691:14; 697:8-11; see JX 15 (Response to Mr. Mejia's FOIA request) 1-24.[6]

Although plaintiff's difficulty in obtaining the photographs and Ms. Calip's nonresponsive testimony raise concerns about defendant's responsiveness to plaintiff's FOIA requests, plaintiff has not demonstrated any connection between ICE and Customs in this matter. Plaintiff presented no evidence demonstrating that ICE and Customs had worked together in order to prevent plaintiff from receiving photographs of the interior of the Pathfinder.

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[6] Ms. Calip testified that, after the news anchorwoman filed a Freedom of Information Act (FOIA) request for the photographs of the Pathfinder taken by Customs, she was instructed by (continued...)

Nor did plaintiff's evidence prove that defendant intended to act in direct contravention of its stated policy to remove all contraband from the Pathfinder. The court finds that defendant did not violate the implied covenant of good faith and fair dealing when it sold the Pathfinder to plaintiff.

IV. Damages

"A cause of action for damages arises upon the breach of a contract." 17A Am. Jur. 2d Contracts § 707 (2008). As Professor Corbin has stated:

> One who commits a breach of contract must make compensation to the injured party. In determining the amount of this compensation as the "damages" to be awarded, the aim in view is to put the injured party in as good a position as that party would have been in if performance had been rendered as promised.

11-55 Corbin on Contracts § 55.3 (rev. ed. 2008). Putting "the injured party in as good a position as that party would have been in if performance had been rendered as promised" is the general principal underlying expectation damages. See id. Section 347 of the Restatement (Second) of Contracts provides the general rule of expectation damages:

> Subject to the limitations stated in §§ 350-53, the injured party has a right to damages based on his expectation interest as measured by
>
> (a) the loss in the value to him of the other party's performance caused by its

failure or deficiency, plus

[6](...continued)
Customs' "headquarters and legal counsel," Tr. 690:22-23, to send a redacted version of the photograph that contained an agent's face, id. at 690:23-691:4. She was then instructed to send the redacted photograph to Mr. Mejia. Id. at 691:5-7. In her response to Mr. Mejia's request, Ms. Calip also included the picture of the interior of the Pathfinder, which she had not included in her response to plaintiff's counsel's request. Compare JX 15 (Response to Mr. Mejia's FOIA request) 17-24 with JX 14 (Response to plaintiff's counsel's FOIA request) 4-9.

> (b) any other loss, including incidental or consequential loss, caused by the breach, less
>
> (c) any cost or other loss that he has avoided by not having to perform.

Restatement (Second) of Contracts § 347 (1981).[7] The

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[7] In addition to the Restatement (Second) of Contracts (1981), the Federal Circuit sometimes looks to the Uniform Commercial Code (U.C.C.), which governs contracts for sales of goods, see U.C.C. § 2-102 (2004), as a point of reference in adjudicating contract disputes, see, e.g., Metro. Area Transit, Inc. v. Nicholson, 463 F.3d 1256, 1260 (Fed. Cir. 2006); CruzMartinez v. Dep't of Homeland Sec., 410 F.3d 1366, 1371 (Fed. Cir. 2005); Rumsfeld v. Freedom NY, Inc., 329 F.3d 1320, 1328 (Fed. Cir. 2003). However, the

Federal Circuit has confirmed the purpose of expectation damages: "[e]xpectation damages give the non-breaching party the benefit of his bargain by putting him in as good a position he would have been had the contract been

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Federal Circuit has observed that "Congress has not applied the Uniform Commercial Code to federal contracts." GAF Corp. v. United States, 932 F.2d 947, 951 (Fed. Cir. 1991). The contract at issue in GAF Corp., however, was not one in which the United States sold goods to a private buyer. See id. at 948. The court is not aware of any case in which the Federal Circuit has ruled on the applicability of the U.C.C. to sales of goods by the government to a private buyer, but the United States Supreme Court has held that "[w]hen the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals." Lynch v. United States, 292 U.S. 571, 579 (1934). If the U.C.C. were to apply to the sales of goods by the government to a private buyer, the U.C.C. would provide additional authority under which the court may award damages to plaintiff. See U.C.C. §§ 2-711, 2-715. According to the U.C.C., if a seller fails to perform a contractual obligation, see U.C.C. § 2-711(1), the buyer may "recover damages for breach with regard to accepted goods," id. § 2711(2)(f), and may also "recover damages in any manner that is reasonable under the circumstances," id. § 2-711(2)(j). Further, the buyer is entitled to recover for "injury to person or property proximately resulting from any breach of warranty" in the form of consequential damages. Id. § 2-715(2)(b). Given the uncertainty as to the applicability of the U.C.C. to this case, the court conducts its damages analysis under the guidelines provided by the Restatement (Second) of Contracts as interpreted and applied by the Federal Circuit.

performed." S. Cal. Fed. Sav. & Loan Assoc. v. United States (S. Cal Fed.), 422 F.3d 1319, 1334 (Fed. Cir. 2005) (citing Bluebonnet Sav. Bank, F.S.B. v. United States (Bluebonnet), 266 F.3d 1348, 1355 (Fed. Cir. 2001)). The Federal Circuit has further held that a three-prong inquiry underlies the awarding of expectation damages:

> Expectation damages are recoverable provided they are actually foreseen or reasonably foreseeable, are caused by the breach of the promisor, and are proved with reasonable certainty.

Bluebonnet, 266 F.3d at 1355 (citing Restatement (Second) of Contracts §§ 347, 351-52 (1981)).

With regard to foreseeability, the Federal Circuit looks to the Restatement (Second) of Contracts for guidance. See Bluebonnet, 266 F.3d at 1355; Landmark Land Co. v. Fed. Deposit Ins. Corp., 256 F.3d 1365, 1378 (Fed. Cir. 2001). Section 351 of the Restatement concerns "Unforeseeability and Related Limitations on Damages:"

> (1) Damages are not recoverable for loss that the party in breach did not have reason to foresee as a probable result of the breach when the contract was made.
>
> (2) Loss may be foreseeable as a probable result of a breach because it follows from the breach
>
> (a) in the ordinary course of events, or

> (b) as a result of special circumstances, beyond the ordinary course of events, that the party in breach had reason to know.
>
> . . . .

Restatement (Second) of Contracts § 351. The losses suffered by plaintiff were foreseeable to defendant because those losses "follow[] from the breach in the ordinary course of events." See id. Defendant breached its contract with plaintiff when it sold to plaintiff the Pathfinder containing seventeen kilograms of marijuana. See supra Part III.E. It was foreseeable to defendant that, by selling a vehicle containing contraband, the buyer of that vehicle would be at risk for arrest and imprisonment. Only defendant may legally possess contraband, a fact that is evidenced by defendant's policies to retrieve all contraband from seized vehicles. See id. Although the particular circumstances of this case may be unique, it is within the "ordinary course of events" that a vehicle containing contraband would be seized by law enforcement officials and that the owner of the vehicle would be arrested, convicted, and imprisoned. That is exactly what happened to plaintiff, supra Part II.A, and the court determines that the events were foreseeable to defendant at the time defendant sold the Pathfinder to plaintiff. Included in the foregoing are the damages that could reasonably be expected to be incurred in connection with imprisonment: legal fees, additional expenses of family members directly related to plaintiff's imprisonment, plaintiff's lost income, and the costs of the medical treatment for plaintiff's injuries and illnesses caused by the imprisonment.

The second prong in the inquiry regarding

expectation damages concerns causation. In order to determine the causal relationship between a breach of contract and a party's losses, the Federal Circuit has set forth two standards: the "substantial factor" theory and the "but for" theory. Citizens Fed. Bank v. United States (Citizens), 474 F.3d 1314, 1318 (Fed. Cir. 2007). The "substantial factor" theory of causation provides that a plaintiff may recover damages where a defendant's breach of a contract "was a substantial factor in causing the damages." Id. The "but for" theory of causation provides that "a 'plaintiff can only recover those items of damage which are the proximate result of the acts of the [g]overnment.'" Id. (quoting Myerle v. United States, 33 Ct. Cl. 1, 27 (1897)). Ultimately, it is within the discretion of the trial court to determine which standard to apply: "the selection of the appropriate causation standard depends upon the facts of the particular case and lies largely within the trial court's discretion." Id.

The court finds that a causal relationship exists between defendant's breach of contract and plaintiff's losses under either the "substantial factor" or "but for" theories of causation. Each and every item of monetary damages that plaintiff seeks to recover, described in detail below, stems directly from defendant's breach of the contract with plaintiff. Plaintiff's physical and mental health problems, financial woes, and the costs incurred by his family are all direct and foreseeable results of defendant's breach. Defendant breached its contract with plaintiff when it sold the Pathfinder to plaintiff with seventeen kilograms of marijuana contained inside of it. See supra Part III.E. Because of defendant's breach, plaintiff was arrested, charged with possession of illegal narcotics, found guilty, and imprisoned for one year. See supra Part II.A. The health and financial problems that plaintiff has dealt with

during his imprisonment and since his release are directly related to defendant's breach. Defendant is therefore responsible for the consequences of plaintiff's imprisonment. Under the "substantial factor" test, defendant's breach was not only a substantial factor - but also the critical factor - in causing the damages: had defendant not sold the Pathfinder with contraband to plaintiff, plaintiff would not have been arrested and imprisoned. Similarly, under the "but for" test, "but for" defendant's breach, plaintiff would not have been arrested and imprisoned. In either case, had plaintiff not been arrested, he would not face the health and financial problems that he has encountered and will continue to encounter. Thus, the court finds that defendant's breach of contract was both a "substantial factor in causing [plaintiff's] damages," see Citizens, 474 F.3d at 1318, and that plaintiff's damages "are the proximate result of the acts of the [g]overnment," see id.

With regard to the third and final prong, whether the damages are proved with reasonable certainty, the court notes that the parties have stipulated to the monetary amounts for damages regarding plaintiff's health and financial losses. See Stipulations of Fact (Stip.) 6-7. Based on the stipulations, together with extensive testimony, including testimony by both percipient witnesses and qualified experts, see Tr. 754:17-822:14, detailed below, the court concludes that the damages sought by plaintiff are fair and reasonable. The court finds that plaintiff is entitled to expectation damages because of defendant's breach of contract.

A. Plaintiff's Health

In the parties' Stipulations of Fact, the parties stipulate that "plaintiff's total medical expenses are $10,000"

and that "plaintiff's total psychiatric expenses are $12,500." Stip. 6. Defendant states, with respect to each amount, that it "neither concedes that this amount is recoverable as damages in this case, nor stipulates that this category of alleged damages was foreseeable." Id. Because the court has determined that plaintiff's medical costs were foreseeable consequences of defendant's breach and are recoverable by plaintiff, see Part IV, the court accepts the monetary amounts set forth by the parties for the medical costs already incurred by plaintiff. However, because plaintiff requests additional damages to cover the costs of his future medical and psychiatric treatments, Pl.'s Br. 39-40, the court now turns to testimony provided by plaintiff's doctors at trial.

Prior to his imprisonment, plaintiff did not suffer any of the health problems that he developed in prison and continues to suffer to the present day. See Tr. 768:16-769:1 ("The change was evident in [plaintiff]. The change was evident. The change between before he was in prison and after he was in prison, so the fact that he was in prison modified his factors, his life."); id. at 816:18-22 (testimony of Dr. Miguel Lizarraga that plaintiff's imprisonment "triggered the illnesses that he has currently and the ones that were formed"). About six or seven months after entering prison, plaintiff was visited by his doctors, id. at 79:5-9, and three of those doctors presented testimony at trial.

Dr. Jesus Manuel Cesea Caro, a medical doctor, visited plaintiff in prison on July 29, 2002. Id. at 757:12-16; JX 33 (Dr. Cesea's medical report) 3. Dr. Cesea found plaintiff to be "very nervous, depressed, obe[se]." Tr. 757:19; JX 33 (Dr. Cesea's medical report) 1. He concluded that plaintiff was nervous because of his

"[i]nsomnia and crying crises." Tr. 759:9; JX 33 (Dr. Cesea's medical report) 1. Dr. Cesea also noted that plaintiff "was suffering from diarrhea, headache, problems on his skin[,] and difficulty of not being able to keep [up his] personal hygiene." Tr. 761:10-12; JX 33 (Dr. Cesea's medical report) 2-6. Dr. Cesea testified that the lack of personal hygiene probably led to plaintiff's skin ailments, including itching and fungi, Tr. 761:15-16, and to increased cavities in his teeth, id. at 762:8-14. Dr. Cesea diagnosed plaintiff as obese, and, due to plaintiff's added weight and inability to exercise, plaintiff also suffered from articular pain in his knees, id. at 762:18-763:3, from becoming out of breath after a small amount of exercise, id. at 763:19-23, and from "insufficiency of veins," id. at 766:7-8. The prognosis that Dr. Cesea provided at the time was that plaintiff was at risk "to suffer a cardiac problem and emotional disorders." Id. at 767:17-18; JX 33 (Dr. Cesea's medical report) 2. Since plaintiff's release from prison, Dr. Cesea has seen plaintiff several times. Tr. 767:25-768:7. He currently treats plaintiff for diabetes, a condition that Dr. Cesea stated was caused by plaintiff's weight gain in prison. Id. at 769:6-15.

Dr. Hector Santillana, a psychiatrist, examined plaintiff in prison in August 2002. Id. at 772:20-21; 778:7-9. Dr. Santillana conducted the psychiatric exam both by conducting a direct psychiatric exam and by questioning plaintiff. Id. at 779:1-2. The exam gauges the patient's "[p]resentation, demeanor, body appearance, conscious state, adaptability, memory, reasoning, orientation, productivity, and consciousness of mental illness." Id. at 779:1-7. Dr. Santillana testified that, when he examined plaintiff, he found plaintiff to be unkempt in appearance and to have a depressed demeanor, which was evidenced by plaintiff's "crying easily, tiredness, [and] lack of interest [in

life]." Id. at 780:4-6; 780:7-10; 780:22. Dr. Santillana diagnosed plaintiff with major depression, which is the highest grade of depression. Id. at 785:23-786:2; JX 30 (Dr. Santillana's psychiatric report) 10. More specifically, Dr. Santillana determined that plaintiff's depression was reactive and recurrent. Tr. 785:24; JX 30 (Dr. Santillana's psychiatric report) 10. "Reactive" means that an external cause prompted the depression, Tr. 786:4-8, and "recurrent" indicates that the depression can come and go in cycles, id. at 786:20787:5. Dr. Santillana testified that the external cause to plaintiff's depression was "[h]is mistreatment and his confinement," Tr. 786:11; JX 30 (Dr. Santillana's psychiatric report) 8-9, something the doctor classified as "[a] serious external cause," Tr. 789:11. Dr. Santillana also diagnosed plaintiff as being claustrophobic, the "fear [of] being locked up or enclosed," id. at 786:15-16, which the doctor determined "[b]cause of [plaintiff's] anguish and desperation," id. at 786:19. Plaintiff exhibited physical characteristics that Dr. Santillana understood to be indicative of psychiatric conditions. Id. at 788:3-4 (stating that "[a] doctor used to say that when the hurt is not released in tears, it makes other organs cry."). Dr. Santillana found that plaintiff did not have a regular pulse, had chest pains and variation in his blood pressure, was obese, and suffered from a fungus infection. Id. at 788:7-19. In terms of plaintiff's functioning ability, Dr. Santillana graded plaintiff a score of forty on a 100-point scale promulgated by the American Society of Psychiatry. Id. at 789:18-790:14; JX 30 (Dr. Santillana's psychiatric report) 10. If someone is rated at 100 percent, that person is "totally well . . . with no psychiatric issues." Tr. 790:17-18. Dr. Santillana also noted that plaintiff harbored "[f]rank [s]uicide [i]deas," JX 30 (Dr. Santillana's psychiatric report) 10, because plaintiff preferred "to die [rather] than [be] in prison," Tr. 791:18-19.

With regard to treatment options for plaintiff's psychiatric condition, Dr. Santillana testified that plaintiff should be hospitalized for approximately two weeks. Id. at 792:19

24. Dr. Santillana stated that the cost of hospitalization in Tijuana, Mexico is between $4,000 to $5,000 per week. Id. at 793:3-9. After a period of hospitalization, plaintiff would then require out-patient therapy for five years or more, for which Dr. Santillana estimated costs to be between $5,000 to $10,000 per year. Id. at 793:10-15.

Dr. Miguel Lizarraga is a medical doctor, id. at 798:1, with a speciality in treating obesity, id. at 799:4-8. Dr. Lizarraga examined plaintiff in prison in August of 2002. Id. at 801:18-23. Dr. Lizarraga conducted a clinical examination, which included recording plaintiff's heredity information and health history, physically examining plaintiff, and making a diagnosis. Id. at 802:3-11. Plaintiff reported to Dr. Lizarraga that, since entering prison, he suffered from nasal bleeding, headaches, cough, thoracic pain, chest pain, fever, nasal congestion, earache, eye pain, and throat pain. Id. at 803:9-11; JX 31 (Dr. Lizarraga's medical report) 1. Plaintiff also reported suffering from insomnia, shortness of breath, weight gain, pain in his teeth, feeling a burning sensation while urinating, numbness in his legs and hands, inflammation of his legs and ankles, pain in his shoulders, arms, and knees, diarrhea, abdominal pain, and depression. Tr. 803:19-807:18; JX 31 (Dr. Lizarraga's medical report) 1-2. Dr. Lizarraga diagnosed plaintiff as suffering from an emotional disorder, Tr. 810:2-3; JX 31 (Dr. Lizarraga's medical report) 4-5, "morbid obesity with a severe risk of cardiovascular illness," Tr. 810:5-6; JX 31 (Dr. Lizarraga's medical report) 4, dermatitis, JX 31 (Dr. Lizarraga's medical report) 4, conjunctivitis, JX 31 (Dr. Lizarraga's medical

report) 4, hypertension, Tr. 812:9-14, and gastroenteritis, JX 31(Dr. Lizarraga's medical report) 4, which is an infection associated with diarrhea, nausea, and vomiting, id. at 811:21-24. Dr. Lizarraga concluded that plaintiff's health problems stemmed from his "being charged with and consequently becoming a victim of an injustice," that is, that plaintiff's imprisonment caused plaintiff's health disorders. Id. at 814:17-815:2; JX 31 (Dr. Lizarraga's medical report) 5-6.

Dr. Lizarraga testified that the treatment that plaintiff requires, "a treatment with a group of medical scientists specialized in multi-disciplinary [treatment]" can cost over $100,000 in the United States. Tr. 817:4-7. He stated that similar treatment, which includes "endocrinologists, . . . [a] rheumatologist, cardiologist, and nutritionist," id. at 817:11-5, would cost about twenty percent less in Mexico, id. at 821:22-23, which would be $80,000.

Based on the parties' stipulations and the testimony provided at trial, the court awards to plaintiff the following medical expenses incurred and to be incurred: $10,000 for plaintiff's medical bills to date; $80,000 for plaintiff's future medical treatments;

$12,500 for plaintiff's psychiatric bills to date; and $46,500 for plaintiff's future psychiatric treatment.[8]

8

Dr. Santillana testified that plaintiff's psychiatric treatment should entail two weeks of hospitalization and five years or more of ambulatory care. Tr. 792:1-24. He stated that hospitalization costs between $4,000 and $5,000 per

B. Plaintiff's Finances

Plaintiff seeks to recover the fair market value of the Pathfinder, the attorneys fees he incurred to obtain his freedom in Mexico, and the income he lost during the year of his imprisonment. Pl.'s Reply 18-19. The parties stipulated that the fair market value of the Pathfinder is $2,600, that plaintiff's criminal attorneys fees are $350,000, and that plaintiff's lost income is $48,000. Stip. 6. After each stipulation, defendant states that it "neither concedes that this amount is recoverable as damages in this case, nor stipulates that this category of alleged damages was foreseeable." Id. Because the court has determined that the value of the Pathfinder, criminal attorneys fees, and lost income were foreseeable consequences of defendant's breach and are recoverable by plaintiff, see Part IV, the court accepts the monetary amounts to which the parties have stipulated. Thus, the court awards the following to plaintiff: $2,600 for the value of the Pathfinder; $350,000 for the criminal attorneys fees incurred by plaintiff; and $48,000 for the income lost by plaintiff during his imprisonment.

C. Costs and Expenses Incurred by Plaintiff's Family

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week, and that ambulatory care costs between $5,000 to $10,000 per year. Id. at 792:19-793:15. The court arrives at $46,500 as a final sum by taking the median amount for each treatment - $4,500 per week for hospitalization and $7,500 per year for ambulatory care - and multiplying those figures by the time advised by Dr. Santillana for each treatment - two weeks and five years, respectively. The total is $46,500.

Plaintiff seeks to recover "[t]he costs and expenses incurred by his family members to bring him supplies while he was imprisoned." Pl.'s Br. 39; Pl.'s Reply 18. The parties stipulated that "[e]xpenses in the amount of $1,254.00 were incurred when . . . plaintiff's wife traveled to see . . . plaintiff while he was incarcerated." Stip. 6. Defendant states that it "neither concedes that this amount is recoverable as damages in this case, nor stipulates that this category of alleged damages was foreseeable." Id. Because the court determined that the costs incurred by plaintiff's family were foreseeable consequences of defendant's breach and are recoverable by plaintiff, see Part IV, the court awards $1,254 for costs and expenses incurred by plaintiff's family.

D. Emotional Distress

Plaintiff states in briefing that he is entitled to recover "emotional distress damages in an amount which the Court deems reasonable compensation for the arrest and imprisonment of [plaintiff] for a period of 351 days." Pl.'s Reply 19. Plaintiff argues that his emotional distress includes, but is not limited to, "suicidal thoughts . . . [,] serious and life[-]threatening physical injuries and diseases . . . [,] anguish, loss of liberty, stress, embarrassment, humiliation, loss of reputation, fear, anxiety, depression, sorrow, pain, discomfort, uncontrolled crying and emotional breakdowns post[-]traumatic stress disorder, and other related emotional injuries, phobias, and disabilities . . . ." Id. at 19-20. However, the court does not believe it is in a position to determine from scratch, as it were, a "reasonable compensation" for "emotional distress" as requested by plaintiff. The court is awarding plaintiff damages intended to address, as supported by testimony and the parties'

stipulations, the costs of remedying the physical, psychiatric, and financial injuries plaintiff suffered as a proximate result of defendant's breach. The court does not find that an additional award has been supported by plaintiff.

V. Conclusion

For the foregoing reasons, the court determines that defendant breached its contract with plaintiff when defendant sold plaintiff the Pathfinder with seventeen kilograms of marijuana hidden inside. Defendant is directed to pay to plaintiff $10,000 for the medical bills plaintiff incurred from the injuries and illnesses resulting from his imprisonment; $80,000 for the medical expenses it is reasonably foreseeable that plaintiff will incur in the future as a result of the injuries and illnesses he suffered resulting his imprisonment; $12,500 for the psychiatric bills plaintiff has incurred as a result of the psychiatric ailments that his imprisonment caused; and $46,500 for psychiatric expenses it is reasonably foreseeable that plaintiff will incur as a result of his imprisonment; $2,600 for the fair market value of the Pathfinder; $350,000 for attorneys fees incurred by plaintiff during his criminal proceedings in Mexico; $48,000 for the income plaintiff lost during his imprisonment; and $1,254 for the costs and expenses incurred by plaintiff's family in bringing supplies to plaintiff while he was imprisoned. The Clerk of the Court is directed to ENTER JUDGMENT for plaintiff in the amount of $550,854.

IT IS SO ORDERED.

s/ Emily C. Hewitt EMILY C. HEWITT Judge

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

FRANCISCO JAVIER RIVERA AGREDANO and ALFONSO CALDERON LEON,

Plaintiffs,

v.

UNITED STATES OF AMERICA; EG & G INC., a Corporation, status unknown; and MCCORMACK AUCTION COMPANY, status unknown,

Defendants.

Civil No: 02CV2243-B (NLS)

ORDER GRANTING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT AND PLAINTIFFS' MOTION FOR LEAVE TO AMEND COMPLAINT

Defendants United States of America, EG&G, Inc., and McCormack Auction Company move for summary judgment on tort claims arising under the Federal Tort Claims Act, 28 U.S.C §§ 1346(b), 2671-80. Plaintiffs Francisco Javier Rivera

Agredano ("Rivera") and Alfonso Calderon Leon ("Calderon") oppose the motions and request leave to amend their complaint.

For the reasons set forth below, the Court **GRANTS** the motions for summary judgment by all Defendants. The Court also **GRANTS** Plaintiffs' motion for leave to amend the complaint.

FACTUAL BACKGROUND

On January 25, 2001, the United States Customs Service ("Customs") stopped a vehicle at the U.S./Mexico border. Upon searching the vehicle, Customs agents discovered a large quantity of marijuana in the vehicle. Customs officers arrested the driver of the vehicle and seized the vehicle, a 1987 Nissan Pathfinder ("Subject Vehicle"). The driver was taken into custody and eventually pled guilty to importation of 59 pounds of marijuana.

After the driver was convicted of the criminal charges , the United States ("U.S") placed the subject Vehicle for sale to the public at a Federal Forfeiture Sale. The U.S. contracted with Defendant EG&G, Inc.("EG&G"), to direct and organize the Federal Forfeiture Sale; the auction was conducted by Defendant McCormack Auction Company ("McCormack"). On September 5, 2001, Plaintiff Rivera purchased the Subject Vehicle from the U.S at the above-referenced Federal Forfeiture Sale.

On January 24, 2002, Rivera was traveling in the Subject Vehicle with Plaintiff Calderon (collectively

"Plaintiffs") from Ensenada, Mexico to Tijuana, Mexico. Plaintiffs were stopped by Mexican authorities at the El Sauzal checkpoint on the highway between Ensenada and Tijuana. The Mexican authorities searched the vehicle and discovered twenty-two packages of marijuana, weighing a total of seventeen kilograms (approximately thirty-seven pounds), hidden beneath the side upholstery on the back of the driver and front passenger seats. Plaintiffs were taken into custody and imprisoned in Mexico.

During the time that they were in Mexican prison, the marijuana found in the Subject Vehicle was tested and found by experts to be :highly dehydrated, consistency and texture had been lost, and due to color lost, it had a brownie trend..change in texture and consistency is also due to they [sic] have been stored or exposed to certain physical or atmospheric conditions, change in color is due to an old or stored marijuana." Plaintiffs also presented evidence, obtained through the Freedom of Information Act, that neither the U.S., Customs, EG&G nor McCormack had researched the subject vehicle in the place where the Mexican authorities found the seventeen kilograms of marijuana. Plaintiffs were released from Mexican prison on January 10, 2003.

PROCEDURAL BACKGROUND

On July 4, 2002, Plaintiffs filed an administrative claim with the United States under the requirements of the Federal Tort Claims Act ("FTCA"), codified at 28 U.S.C. §§ 1346(b) and 2671 et seq. That claim was denied on October 10, 2002.

On November 14, 2002, they timely filed the instant suit against Defendants United States of America/Department of th Treasury/Customs, EG&G and McCormack alleging: (1) negligence, (2) Breach of Contract, (3) Breach of the Implied Covenant of Good Faith and Fair Dealing, (4) Fraud/Intentional Misrepresentation, (5) Negligent Infliction of Emotional Distress, (6) International Infliction of Emotional Distress, (7) Negligent Misrepresentation, and (8) Violation of the Consumer Legal Rights Act. On December 18, 2002, Plaintiffs filed their first amended complaint pursuant to Federal Rule of Civil Procedure 15(a). The First amended complaint did not add or change any of the causes of action listed in the original complaint.

On February 14, 2003, Defendant United States filed a motion to dismiss, and in the alternative to transfer venue. Pursuant to a stipulation between the parties, the motion to dismiss was withdrawn on August 26, 2003. Under the same stipulation, Plaintiffs filed a second amended complaint on August 26, 2003, eliminating the claims for breach of contract and breach of implied covenant of good faith and fair dealing.

On October 2, 2003, Defendants filed a motion to dismiss specified defendants and certain claims. On October 29, 2003, Plaintiffs filed for leave to file a third amended complaint. Plaintiffs sought to add two additional plaintiffs-Carmen Rivera Calderon Leon and Gabriel Calderon Leon-and to substitute the United States for Defendant U.S./Department of Treasury/United States Customs. On December 1, 2003, Defendant Customs filed a partial opposition to Plaintiffs' motion to file a third amended complaint. On

January 7, 2004, the court permitted the third complaint, adding the two new plaintiffs only as to Defendants EG&G and McCormack, and substituting the United States for "U.S./Department of Treasury/United States Customs" as Defendants to the claims alleged by Calderon and Rivera. Defendants United States, EG&G and McCormack Auction Company filed separate answers to the third amended complaint on June 24, 2004, adding the United States of America as defendant for the two new plaintiffs' claims.

On July 16, 2004, Defendant United States filed the instant motion for the summary judgment ("Plaintiffs' Opposition") on September 3, 2004. United States and EG&G filed their replies by September 17, 2004. Parties were heard on October 12, 2004.

STANDARD OF LAW

Rule 56 Summary Judgment

A moving party may be entitled to summary judgment as a matter of law if he can prove that "there is no genuine issue as to any material fact." Fed. R. Civ. P. 56 © Once this burden is met, the nonmoving party can defeat summary judgment by demonstrating that a material issue of fact exists. See Celotex Corp v. Catrett, 477 U.S. 317, 322 (1986). The court views the evidence " in the light most favorable to the party against whom summary judgment is sought: Morgan v. United States, 709 F. 2d 580, 584 (9th Cir. 1983).

ANALYSIS

I. UNITED STATES MOTION FOR SUMMARY JUDGMENT

The United States assersts that it qualifies for sovereign immunity under the exceptions to the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(B), 2671-80 (2004). The sovereign immunity of the United States has long been established; " [t]he universally received opinion is, is that no suit can be commenced or prosecuted against the United States; that the judiciary act does not authorize such suits." Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 411-12 (1821). The United States government may not be sued unless Congress specifically authorizes the suit, and then, only " in the manner and subject to the restrictions that it may see fit to impose. "Reid v. United States, 211 U.S. 529, 538 (1909); see Munro v. United States, 303 U.S. 36, 41 (1938); Finn v. United States, 123 U.S. 227, 233 (1887). Congress has authorized suits against the United States through the FTCA for tort claims and the Tucker Act for non-tort contract claims or action for damages.

A. Federal Tort Claims Act

The Federal Tort Claims Act ("FTCA"), 28 U.S.C.§§1346(b), 2671-80, provides for federal court jurisdiction over actions against the United States for injury "caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. "28 U.S.C. §§1346(b)(1) (emphasis added). Hence, the United States waives sovereign immunity for

particular claims under the FTCA. See Blackburn v. United States, 100 F.3d 1426, 1429 (9th Cir. 1996). However, the Act limits the statutory waiver of sovereign immunity by enumerating a number of exceptions. See 28 U.S.C. §2680. The exceptions were designed to "ensure that 'certain governmental activities' not be disrupted by the threat of damages suits" and to "avoid exposure of the United States to liability for excessive or fraudulent claims." Cervantes v. United States, 465 U.S. 848, 858 (1984)). The district court lacks subject matter jurisdiction over thirteen categories of claims, including any claim "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty... whether or not the discretion involved be abused, " 28 U.S.C. §2680(k) ("foreign country exception").

Thus, a claim against the United States under the FTCA can be heard in federal court for an action (1) by a United States employee "acting within the scope of his office or employment, " 28 U.S.C. §1346(b), (2) alleged to be negligent or wrongful, and (3) not falling under one of the statutory exceptions in 28 U.S.C.§2680.

1. **Scope of Official Duties**

Plaintiffs assert that the United States Customs officers, when searching the seized Subject Vehicle and preparing it for resale, were engaged in activities outside the scope of their duties by "curtailing searches for narcotics in order to increase the resale value of the seized vehicles at auction." Plaintiffs' Opposition, Doc. No. 60. However, the inspection and resale procedures for seized vehicles were within the duties assigned to Customs officers by Federal Statute and regulation.

The United States Customs and Border Protection ("Customs") patrols the country's borders to prevent the unlawful introduction of controlled substances into the United States. 21 U.S.C. §§ 951-971 ("Controlled Substances Import and Export Act:); § 873(b) (authorizing Customs officials, upon Attorney General's request, to assist in enforcement of controlled Substances Act). To perform this responsibility, Customs officials have the authority to conduct the inspection, examination, and search of vehicles, the seizure of property, and the forfeiture and sale of seized property. See 19 U.S.C. § 1594 ("Seizure of conveyances"); § 1595 ("Searches and Seizures"); 19 C.F.R. § 162.0 ("Scope"); §162.7 ("Search of vehicles, persons, or beasts"); §162.21 ("Responsibility and authority for seizures"). After vehicles have been seized, they may be stored, see 19 U.S.C. § 1605, retained or transferred for government use, see 19 U.S.C. §1616a(c)(1), or destroyed, see 19 C.F.R. §162.48(b)(1). They also may be sold through public auction. See 19 U.S.C. §1609(a); C.F.R.§§ 127.21,162.46. The proceeds of the sale, after deducting the costs of seizure and sale, are deposited into the Customs Forfeiture Fund. 19 U.S.C. §§1609, 1613b. The Fund is used for a variety of purposes, including reimbursement for expenses of the seizure; inventory; security, and maintenance of custody of property; and other expenses necessary to further the enforcement duties of the United States Customs Service. See 19 U.S.C. § 1613b(a).

Hence, the Customs officials, in conducting inspections, were guided by government regulations and policies and performed functions as part of their

positions of employment. Customs officials acted as authorized under federal statute and regulation and neither sold seized vehicles to "increased profits", nor improperly deposited or utilized sale proceeds for profit purposes instead of depositing such proceeds into Customs Forfeiture Fund for governmental use. When they searched and sold the Subject Vehicle, they were acting "within the scope of their office or employment", as prescribed by federal statute and regulation.

2. **Negligent failure to inspect**

Once the government made the decision to sell the Subject Vehicle, Customs officials were obligated by regulations and written procedures to conduct a thorough pre-sale inspection to remove any detectable contraband. Before sale at public auction, Customs written policies require that a vehicle be subject to further inspection to ensure that all contraband or illegal materials have been removed. Although the Customs regulations do not specifically address the inspection treatment of seized vehicles before sale, internal Customs field operations memoranda in 2000 specified that "[p]rior to the sale of all conveyances, seized and forfeited for smuggling of controlled substances, a final canine screening or inspection must occur." Memorandum from Bonnie Tischler (Sept. 15, 2000), Doc. No. 54, ex 4. Such inspection had to occur either through "Non-Intrusive Inspection" technology, a canine "narcotic detector,"or a seven-point inspection. Id. The Southern California Customs Management Center (CMC) prescribed more specific requirements before resale. The seizing officer had to conduct a "complete and thorough exam" on the vehicle, followed by re-examination by the inspector and supervisor.

Memorandum from Rudy M. Camacho (November 28, 2000), Doc. No. 54, ex 5.

However, the U.S. negligently failed to conduct a "complete and thorough exam" on the vehicle. Although it was always possible that contraband could escape detection, and that officers were urged to "be inventive and resourceful in re-examining the entire seized vehicle in question," see Camacho Memo, the marijuana in the Subject Vehicle was found in an area commonly known to be used to conceal contraband. Indeed, Mexican authorities had found the drugs immediately, within "a few moments right after [Plaintiffs'] detention."Plaintiffs' Opposition, Doc. No. 60, ex. H, at 237. As a result of Customs officials' negligence, Plaintiffs suffered injury after being arrested and imprisoned in Mexico for almost one year.

3. Foreign Country Exception

The recent Supreme Court case of Sosa v. Alvarez-Machain, 124 S. Ct. 2739 (2004), however, preserves sovereign immunity under the foreign country exception, 28 U.S.C.§2680(k). In Sosa, plaintiff Dr. Alvarez-Macharin ("Alvarez"), a Mexican physician, sued the United States for false arrest, seeking damages under the FTCA. Alvarez had been kidnapped from his house in Mexico and brought to Texas, where he was arrested by federal officers on a valid arrest warrant issued by the Central District of California. See Sosa, 124 S. Ct. At 2746. After Alvarez was granted his motion for a judgment of acquittal, he initiated a civil action against the hired Mexican civilians who kidnapped him, the United States, and DEA agents for injury caused by their "negligent or wrongful act[s] or

omission[s]." See Sosa, 124 S. Ct. At 2724; 28 U.S.C. § 1346(b)(1). Relying upon the foreign country exception, the United States filed a motion to dismiss, stating that Alvare's claim involved an injury "arising in a foreign country" and therefore could not be heard in federal district court. The Central District of California granted the United States' motion to dismiss the FTCA claim. The Ninth Circuit panel reversed, and the court en banc agreed, stating that "the DEA had no authority to affect Alvarez's arrest and detention in Mexico," recognizing federal court jurisdiction over the FTCA claim and liability of the United States under California tort law of false arrest. Alvarez-Machain v. United States, 331 F.3d 604, 608, 640-41 (2003). The Court of Appeals relied upon the "headquarters doctrine" to assert jurisdiction over Alvarez's claim. Despite the foreign country exception, "a claim can still proceed under the headquarters doctrine if harm occurring in a foreign country was proximately caused by acts in the United States." Id at 638. Because the DEA agents had planned, approved, and supervised elements of Alvarez's abduction scheme from DEA offices in the United States, "[t]the United States, and California in particular, served as command central for the operation carried out in Mexico." Id. At 639.

However, the Supreme Court reversed the Ninth Circuit, rejecting the headquarters doctrine and strictly applying the foreign country exception. The Court, citing proximate cause and choice of law concerns, concluded that the headquarters doctrine "should have no part in applying the foreign country exception." Sosa, 124 S. Ct. At 2754. The Supreme Court thus held that "FTCA's foreign country exception bars all claims based on any injury suffered in a foreign country, regardles of where

the tortuous act or omission occurred." Sosa, 124 S. Ct at 2754. Here, parties do not contest the fact that Rivera and Calderon were arrested in Mexico and incarcerated in Mexican prison-the injury for which they claim relief.

Although employees of the United States committed negligent acts within the scope of their official duties and would otherwise have been liable under the FTCA, the causes of action alleged under the fourth amended complaint all sound in tort. Under Sosa, this Court finds that as a matter of law, the United States has sovereign immunity against the Plaintiffs' alleged claims under the foregoing country exception of the Federal Tort Claims Act. Therefore, the United States of America's motion for summary judgment is hereby **GRANTED.**

B. Tucker Act

Plaintiffs alternatively claim that the United States waives its immunity because it is bound by its contracts when engaging in business transactions and therefore can be liable under the Tucker Act, 28 U,S.C. §1491, for breaching its contractual and warranty agreement with Plaintiffs. The Tucker Act waives the government's sovereign immunity and provides the Court of Federal Claims with jurisdiction to hear claims founded "upon any excess or implied contract with the United States, or for liquidated damages in cases not sounding in tort. "28 U.S.C. §1491. Under the Act, the district court and the Court of Federal Claims have concurrent jurisdiction to hear claims under $10,000. See M-S-R Pub. Power agency v. Bonneville Power Admin., 297 F.3d 833, 840 (9th Cir. 2002); 28 U.S.C. § 1346(a). Plaintiffs' fourth amended complaint does not

allege any claims founded upon any "express or implied contract...not sounding in tort." 28 U.S.C. § 1491 (emphasis added).

Therefore, the Tucker Act does not apply to any causes of action alleged before this Court. Plaintiffs thus move for leave to amend once again their complaint to assert breach of contract and warranty claims under the Tucker Act. Plaintiffs had agreed, per stipulation on August 26, 2003, to amend their complaint to eliminate their contract claims. The written stipulation does not indicate wether such claims were voluntary dismissed with or without prejudice; the stipulation only provided for amendment of the complaint, eliminating their contract claims.

Therefore, Plaintiffs may reassert such claims in an amended complaint. The Court GRANTS Plaintiffs' motion for leave to amend their complaint to add contract causes of action if desired. Plaintiffs shall file any such fifth amended complaint by November 23, 2004. Therefore, Plaintiffs may reassert such claims in an amended complaint. The Court GRANTS Plaintiffs' motion for leave to amend their complaint to add contract causes of action if desired. Plaintiffs shall file any such fifth amended complaint by November 23, 2004.

II. EG&G MOTION FOR SUMMARY JUDGMENT

Defendant/movant EG&G argues that as a government contractor, EG&G was bound only by the terms of its contract with the United States Customs Service and therefore had no independent duty to conduct a pre-sale search of the vehicle. Parties do not contest the fact that EG&G was designated by the Department of Treasury as the

primary contractor for seized and abandoned property. See EG&G SJ Motion, Doc. No. 46, at 5; Contract Tc-96-001, attached to Declaration of Joe Dennis, Jr., Doc. No. 48; U.S. Department of the Treasury Auctions, "EG&G Technical Services," at http://www.treas.gov/auctions/customs/egg.html (Last visited Oct. 1, 2004). Parties also do not contest the Fact that EG&G performed mechanical or maintenance services on specific vehicles only by request via "Disposition Order" from the United States.

Defendat EG&G had no duty under California law to conduct a pre-sale inspection of the Subject Vehicle.. EG&G admits that it could offer services in addition to the required "receipt, custody, security, transportation, review of Appraised Value.... maitanence, repair, modification, refurbishment, upgrade, final disposition" of seized property. Contract Tc-96-001 ¶ 1.2, Doc. No. 48. For example, EG&G would be willing to provide "services to facilitate inspection to identify illegally built compartments" or "provide services for the movement of conveyances to Customs x-ray facilities for the purpose of detecting controlled substances," but only upon request by Customs. Contract Tc-01-134 ¶ 3.2.1, attached to Declaration of Joe Dennis, Jr., Doc No. 48; Declaration of Charles Fulghum ¶ 12. Defendant asserts that customs did not

issue a disposition order requesting such additional services relating to the inspection of the seat upholstery, where the contraband was located; Plaintiffs neither claim that such order was issued nor argue that EG&G failed to follow the terms of its contract with the United States. Plaintiffs furnish no opposition to EG&G's Assertion of lack of duty to inspect.

Under its contract with the United States Customs Service, EG&G had no duty to inspect the Subject Vehicle for contraband. EG&G was merely authorized to inspect the Subject Vehicle to identify its general condition. EG&G expressly disclaimed responsibility for the final disposition of "controlled substances." Furthermore, United States Customs had the duty to issue a disposition order to authorize any independent search of the Subject Vehicle and to inform EG&G of any restrictions, which would be listed in the sales catalog prior to sale. There is no evidence that the United States either issued a disposition order regarding the illegal compartments in the side paneling or provided any restrictions relating to the side door paneling or the potential for remaining contraband in the Subject Vehicle. Thus, the Court GRANTS EG&G's motion for summary judgment based on the absence of any contract duty agreed to between the parties to inspect vehicles for contraband.

III. MCCORMACK AUCTION COMPANY MOTION FOR SUMMARY JUDGMENT

Defendant McCormack Auction Company operates under contract with EG&G to conduct auctions of seized vehicles. McCormack contracted to provide auctioneering services and "never conducted, nor [was]

it qualified to conduct, an inspection of the seized vehicles for illegal drugs." Declaration of Ken McCormack ¶ 2. McCormack Auction Company was under no duty to inspect the Subject Vehicle. Plaintiffs have not provided opposition briefing as to McCormack's liability in this case. As McCormack, like EG&G, had no duty to inspect the vehicle for contraband and cannot be held liable for any negligence of the United States, McCormack Auction Company's motion for summary judgment is **GRANTED.**

CONCLUSION

For the reasons stated above, the Court GRANTS United States' motion for summary judgment on the fourth amended complaint, and GRANTS LEAVE to Plaintiffs to AMEND their complaint to allege contract claims or other claims not sounding in tort. The Court also GRANTS the motion for summary judgment by EG&G and McCormack

IT IS SO ORDERED

DATED: 11/2/2004

HON. RUDI M. BREWSTER

U.S DISTRICT JUDGE

United States Court of Appeals for the Federal Circuit

2008-5114, 5115.

FRANCISCO JAVIER RIVERA AGREDANO and

ALFONSO CALDERON LEON,

PLAINTIFFS-Cross Appellants,

v.

UNITED STATES,
Defendant-Appellant.

Appeals from the United States Court of Federal Claims in 05-CV-608; Judge Emily C. Hewitt

ORDER

A combined petition for panel rehearing and for rehearing en banc having been filed by the Cross-Appellants, and the petition for rehearing, having been referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for panel rehearing be, and the same hereby is DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED

The mandate of the court will issue on April 23, 2010

For the Court, Jan Horbaly, Clerk

Dated: 4-16-10

cc: Patricia McCarthy

Teresa Trucchi

DEC 6

No. 10-99

In the Supreme Court of the United States

FRANCISCO JAVIER RIVERA AGREDANO, ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

Petitioners brought a breach-of-contract suit against the United States in the Court of Federal Claims seeking compensation for damages they incurred after the vehicle in which they were traveling, which petitioner Rivera Agredano had purchased at a forfeiture auction conducted by United States Customs and Border Protection (Customs), was stopped by Mexican authorities and found to contain hidden marijuana. The questions presented are as follows:

1. Whether the court of appeals correctly concluded that the sale agreement between petitioner Rivera Agredano and Customs did not include an implied-in-fact warranty that the vehicle would be free of contraband.

2. Whether the court of appeals erred in declining to consider petitioners' subsidiary arguments regarding emotional distress damages and petitioner Calderon Leon's purported status as an intended third-party beneficiary of the contract.

3. Whether the court of appeals abused its discretion in declining to transfer petitioners' Federal Tort Claims Act claims to the United States Court of Appeals for the Ninth Circuit.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Argument 5
Conclusion 11

TABLE OF AUTHORITIES

Cases:

ABF Capital Corp. v. *Osley*, 414 F.3d 1061 (9th Cir. 2005), cert. denied, 546 U.S. 1138 (2006) 9

Anderson v. *United States*, 344 F.3d 1343 (Fed. Cir. 2003) 6

Centex Corp. v. *United States*, 395 F.3d 1283 (Fed. Cir. 2005) 6

Cervantes v. *United States*, 330 F.3d 1186 (9th Cir. 2003) 10

Christianson v. *Colt Indus. Operating Corp.*, 486 U.S. 800 (1988) 10

Crenega Gardens v. *United States*, 194 F.3d 1231 (Fed. Cir. 1998), cert. denied, 528 U.S. 820 (1999) 5

D & N Bank v. *United States*, 331 F.3d 1374 (Fed. Cir. 2003) 4, 6

Fairmont Shipping Corp. v. *Chevron Int'l Oil Co.*, 511 F.2d 1252 (2d Cir.), cert. denied, 423 U.S. 838 (1975) 7

Little River Lumber Co. v. *United States*, 7 Cl. Ct. 492 (1985) 10

Cases—Continued: Page

Precision Pine & Timber, Inc. v. *United States*, 596 F.3d 817 (Fed. Cir. 2010), petition for cert. pending, No. 10-341 (filed Sept. 8, 2010) 6
Rodriguez v. *United States*, 862 F.2d 1558 (Fed. Cir. 1988) 10
Ryan Stevedoring Co. v. *Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956) 5, 7
Sosa v. *Alvarez-Machain*, 542 U.S. 692 (2004) 3
United States v. *Marcus*, 130 S. Ct. 2159 (2010) 3

Statutes and rules:

Federal Tort Claims Act:
28 U.S.C. 1291 9
28 U.S.C. 1295(a)(3) 9
28 U.S.C. 1346(b) 2
28 U.S.C. 1631 ..... 8, 9
28 U.S.C. 2671-2680 2
28 U.S.C. 2680(k) 2
Tucker Act, 28 U.S.C. 1491 3
Fed. R. App. P.:
Rule 4(a)(1)(B) 9
Rule 4(a)(7)(A)(i) 9
Rule 4(a)(7)(A)(ii) 9

In the Supreme Court of the United States

No. 10-99

FRANCISCO JAVIER RIVERA AGREDANO, ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-8) is reported at 595 F.3d 1278. The opinion of the Court of Federal Claims (Pet. App. 9-101) is reported at 82 Fed. Cl. 416.

JURISDICTION

The judgment of the court of appeals was entered on February 17, 2010. A petition for rehearing was denied on April 16, 2010 (Pet. App. 118-119). The petition for a writ of certiorari was filed on July 14, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In September 2001, petitioner Rivera Agredano purchased a used 1987 Nissan Pathfinder at an auction

of forfeited vehicles conducted by United States Customs and Border Protection (Customs). Pet. App. 2, 21-22. The vehicle had been seized by Customs and forfeited when its previous owner attempted to transport marijuana across the Mexican border into the United States. *Ibid.*

The auction's sales literature contained two express warranty disclaimers. The first disclaimer said that "[a]ll merchandise is sold on an 'AS IS, WHERE IS' basis, without warranty or guarantee as to condition, fitness to use, or merchantability stated, implied, or otherwise." Pet. App. 2, 23. The second disclaimer stated that Customs provided no warranties "regarding any aspect of the vehicle or its ability to operate." 593 F.3d 1278-1279 (2010).

Unbeknownst to either party, the vehicle contained a significant amount of concealed marijuana. Pet. App. 2. Approximately four months after the sale, petitioner Rivera Agredano was traveling in the vehicle in Mexico with petitioner Calderon Leon when the two men were stopped at a checkpoint by Mexican authorities, who inspected the vehicle and found the hidden marijuana. *Id.* at 2, 25. Petitioners were arrested and spent approximately one year in Mexican prison before being ordered released by a Mexican appellate court. *Id.* at 2-3, 37.

2. In November 2002, petitioners filed a civil tort action against the United States in the United States District Court for the Southern District of California. Pet. App. 3, 105. Petitioners invoked the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671-2680. The district court dismissed petitioners' FTCA claims, holding that the FTCA's "foreign country" exception (28 U.S.C. 2680(k)) barred the suit because the injuries for which petitioners sought relief had occurred in Mexico.

Pet. App. 111-113; see *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 712 (2004).

The district court stated, however, that it would permit petitioners to amend their complaint to allege contract claims against the United States under the Tucker Act, 28 U.S.C. 1491. See Pet. App. 114. Petitioners subsequently amended their complaint to allege only contract claims, and they stipulated that their FTCA claims would be dismissed without prejudice. No. 3:02-cv-02243-B-NLS, Docket entry No. 92 (S.D. Cal. Feb. 3, 2005). The parties also stipulated that the amended complaint would be transferred to the Court of Federal Claims (CFC). *Ibid.*

3. The district court transferred petitioners' amended complaint to the CFC, and the United States moved to dismiss the suit. The CFC granted the motion to dismiss with respect to the claims brought by petitioner Calderon Leon on the ground that Calderon Leon was not an intended third-party beneficiary of the contract between petitioner Rivera Agredano and the United States. 70 Fed. Cl. 564, 579 (2006). The court concluded, however, that petitioner Rivera Agredano had adequately stated a claim against the United States for breach of contract. Pet. App. 38-39.

After a trial, the CFC held that Customs had breached an implied-in-fact warranty that the vehicle it sold to petitioner Rivera Agredano did not contain contraband. See Pet. App. 9-101. The court stated that an implied warranty arose from "a meeting of minds" between the parties, with Customs communicating a "tacit understanding" that it had complied with its regulatory procedures requiring the removal of contraband from vehicles prior to sale, and petitioner reasonably assuming that the United States would not sell a vehicle con-

taining illegal contraband. *Id.* at 71-72. The court awarded $550,854 in damages to petitioner Rivera Agredano. *Id.* at 101. The damages award did not include petitioner Rivera Agredano's requested compensation for emotional distress, which the court concluded was not warranted based on the evidence. *Id.* at 100-101.

4. The court of appeals reversed. Pet. App. 1-8. Citing established Federal Circuit precedent, the court held that an implied-in-fact warranty could not be based solely upon the expectation that Customs had fulfilled a regulatory duty. *Id.* at 4-5 (citing *D & N Bank* v. *United States*, 331 F.3d 1374, 1378-1379 (2003)). The court also stated that petitioners' claim of an implied warranty was "further undermined" by Customs' express disclaimers, including a statement in the sale literature that Customs made no warranties "regarding any aspect of the vehicle *or* its ability to operate." *Id.* at 5. The court of appeals stated that it was "incongruous to find that Customs impliedly warranted what it expressly disclaimed." *Id.* at 6.

Judge Dyk concurred. Pet. App. 6-7. He concluded that "[a]bsent a contractual warranty disclaimer," the sale of an automobile by the government to a private purchaser "likely carries with it an implied-in-fact warranty of fitness, including a warranty that the vehicle does not contain illegal drugs." *Id.* at 7. Because the contract here "explicitly disclaimed all warranties," however, Judge Dyk agreed that the vehicle was not covered by any implied-in-fact warranty. *Ibid.*

ARGUMENT

Petitioners contend (Pet. 9, 12, 14-17) that the sale agreement between petitioner Rivera Agredano and the United States included an implied-in-fact warranty that

the vehicle did not contain contraband. The court of appeals correctly rejected that argument, and its decision does not conflict with any decision of this Court or another court of appeals. Petitioners further contend (Pet. 20-27) that the court of appeals erred by failing to address subsidiary issues related to petitioner Rivera Agredano's emotional distress damages and petitioner Calderon Leon's third-party beneficiary status, and by failing to transfer their FTCA claims to the Ninth Circuit. The court of appeals properly declined to address those issues. Further review is not warranted.

1. Petitioners argue that the court of appeals applied an improper standard of review to evaluate the CFC's decision that the sales contract between petitioner Rivera Agredano and the United States contained an implied-in-fact warranty that the vehicle was free of contraband. Petitioners further contend that the court of appeals' ruling conflicts with this Court's decision in *Ryan Stevedoring Co.* v. *Pan-Atlantic Steamship Corp.*, 350 U.S. 124 (1956). Petitioners' arguments are premised on a misunderstanding of the court of appeals' decision.

a. The court of appeals did not adopt a new standard for reviewing a trial court's factual findings. In fact, the court stated that it would "review the [CFC's] decision * * * for clear error on findings of fact." Pet. App. 4. But the question whether the vehicle sales contract contained an implied-in-fact warranty is a mixed question of fact and law, which is subject to *de novo* review. See *Cienega Gardens* v. *United States*, 194 F.3d 1231, 1239 (Fed. Cir. 1998), cert. denied, 528 U.S. 820 (1999).

In holding that the contract did not include an implied-in-fact warranty, the court of appeals stated that "it is incongruous to find that Customs impliedly

warranted what it expressly disclaimed." Pet. App. 6. Far from creating any new standard, the court of appeals simply applied the contract-law axiom that obligations created under implied contract terms cannot be inconsistent with obligations created by express contract terms. See, *e.g.*, *Centex Corp.* v. *United States*, 395 F.3d 1283, 1304-1306 (Fed. Cir. 2005). Indeed, the Federal Circuit's decision in *Precision Pine & Timber, Inc.* v. *United States*, 596 F.3d 817 (2010), petition for cert. pending, No. 10-341 (filed Sept. 8, 2010), cited the decision in this case in support of the proposition that implied contractual duties "cannot * * * create duties inconsistent with the contract's provisions." *Id.* at 831.

Even without these express disclaimers, petitioners have identified no conflict among the circuits with respect to the court of appeals' holding that as a matter of law, "[a]n agency's performance of its regulatory or sovereign functions does not create contractual obligations." *D & N Bank* v. *United States*, 331 F.3d 1374, 1378-1379 (Fed. Cir. 2003); see Pet. App. 5-6. To establish that the government assumed a contractual obligation to perform its regulatory duties properly, the plaintiff must demonstrate "an objective manifestation of voluntary, mutual assent" to that effect. *Anderson* v. *United States*, 344 F.3d 1343, 1353 (Fed. Cir. 2003). Petitioners presented no evidence of such an understanding here. To the contrary, the CFC acknowledged that its implied-warranty holding was based solely on the fact that federal law requires Customs to search seized vehicles for contraband before offering them for sale. Pet. App. 63-67. Without disturbing any of the predicate facts found by the trial court, the court of appeals held that this regulatory duty was insufficient to support the existence of an implied-in-fact warranty. *Id.*

at 5 ("[T]he source of any responsibility on the part of Customs to search vehicles and remove contraband is its regulatory function and failure to adequately perform this responsibility does not provide a contractual remedy."). That holding is supported by well-established legal principles, and it raises no issue warranting this Court's review.

b. Petitioners also contend (Pet. 12) that the court of appeals' holding conflicts with this Court's decision in *Ryan Stevedoring Co.* v. *Pan-Atlantic Steamship Corp.*, 350 U.S. 124 (1956). That decision is inapposite. In *Ryan Stevedoring*, the plaintiff shipowner hired the defendant to perform stevedoring services for the shipowner's cargo operations. *Id.* at 133. The Court held that a contractual agreement to perform stevedoring services "necessarily includes [an] obligation not only to stow [cargo], but to stow [it] properly and safely." *Ibid.* The Court's decision was based on a structural aspect of maritime law known as the "absolute duty of seaworthiness," which "requires shipowners, regardless of fault, to pay for accidents caused by stevedores," thereby leaving shipowners without recourse against negligent stevedores. *Fairmont Shipping Corp.* v. *Chevron Int'l Oil Co.*, 511 F.2d 1252, 1258 (2d Cir. 1975), cert. denied, 423 U.S. 838 (1975). This case, by contrast, does not involve the application of maritime law; petitioner Rivera Agredano did not contract for Customs to provide him with any service; and Customs expressly disclaimed all warranties in the auction sales literature. Pet. App. 6-7.

2. Petitioners also contend (Pet. 21-27) that certiorari should be granted because the court of appeals did not address whether emotional distress damages were available to petitioner Rivera Agredano in this case, or whether petitioner Calderon Leon is an intended third-

party beneficiary to the contract. The CFC determined that petitioner had not presented sufficient evidence of emotional distress. Pet. App. 101. The CFC also held, after reviewing the relevant provisions of the Uniform Commercial Code and case law from various jurisdictions, that passengers in a vehicle are not intended third-party beneficiaries of a contract for sale of the vehicle. 70 Fed. Cl. 564, 578-579 (2006).

Petitioner identifies no conflict in the courts of appeals on these issues. In any event, the court of appeals appropriately declined to consider those subsidiary issues because the court's resolution of those questions would have no effect on the outcome of the case. Pet. App. 6. Even if Rivera Agredano had adequately proved emotional injuries resulting from his arrest and imprisonment, or Calderon Leon had established his status as an intended third-party beneficiary of the sale contract, neither petitioner could obtain any recovery in this suit without first demonstrating that the government had breached an implied contractual promise that the vehicle did not contain marijuana. As the court of appeals correctly explained, those issues were "rendered moot" by the court's holding that the vehicle sale contract did not contain an implied-in-fact warranty. *Ibid.*

3. Finally, petitioners contend (Pet. 20-21) that the court of appeals erred by failing to transfer their FTCA claims to the United States Court of Appeals for the Ninth Circuit pursuant to 28 U.S.C. 1631. The amended complaint that was transferred to the CFC contained only contract claims. See No. 3:02-cv-02243-B-NLS, Docket entry No. 92 (S.D. Cal. Feb. 3, 2005) (stipulating that amended complaint would allege "only contract claims"); see also Pet. App. 38 (stating that petitioners' amended complaint included only contract claims). For

at least two reasons, the Federal Circuit did not abuse its discretion in declining to transfer to the Federal Circuit petitioners' appeal of the dismissal of their FTCA claims.

First, there is no evident jurisdictional basis for transferring to the Ninth Circuit any portion of this appeal. Petitioners did not seek to appeal either the district court's November 2004 order granting summary judgment for the government on petitioners' FTCA claims, or the district court's February 2005 order dismissing those claims without prejudice. See Pet. App. 38. The time for appealing those orders directly has long since passed. See Fed. R. App. P. 4(a)(1)(B) ("When the United States or its officer or agency is a party, the notice of appeal may be filed by any party within 60 days after the judgment or order appealed from is entered."); cf. Fed. R. App. P. 4(a)(7)(A)(i) and (ii); *ABF Capital Corp.* v. *Osley*, 414 F.3d 1061, 1064 (9th Cir. 2005) (stating that when judgment is not set forth in separate document, judgment is deemed entered 150 days from entry on civil docket), cert. denied, 546 U.S. 1138 (2006). Under 28 U.S.C. 1631, a federal trial or appellate court that does not have jurisdiction over an action or appeal may transfer the action or appeal to a court that does. Petitioners' appeal in this case, however, was from the final judgment entered by the CFC. Because the Federal Circuit rather than the Ninth Circuit had jurisdiction over that appeal, see 28 U.S.C. 1291, 1295(a)(3), the transfer mechanism was unavailable here.

Second, even if Section 1631 authorized transfer, the decision to transfer an action or appeal is discretionary, and a court is not required to undertake that course if transfer would be futile. See *Christianson* v. *Colt*

Indus. Operating Corp., 486 U.S. 800, 819 (1988); *Rodriguez* v. *United States*, 862 F.2d 1558, 1560 (Fed. Cir. 1988); *Little River Lumber Co.* v. *United States*, 7 Cl. Ct. 492, 494 (1985). If petitioners' request for transfer to the Ninth Circuit is viewed as an attempt to obtain direct appellate review of the district court's order dismissing their FTCA claims, the appeal is untimely. See p. 9, *supra*. And as the district court correctly recognized, petitioners' FTCA claims are barred in any event by the statute's "foreign country" exception.[1]

In addition, even if Customs officials could be shown to have acted negligently in failing to discover the marijuana secreted within the car, their conduct did not breach any duty owed to petitioners at the time the inspection occurred. Rather, petitioners' FTCA claims necessarily depend on the premise that the government acted tortiously in later selling them a car that (unbeknownst to Customs) contained marijuana. To find on that basis that the government breached a tort-law duty owed to petitioners would effectively negate the Federal Circuit's holding that the disclaimers communicated in connection with the vehicle sale adequately protected the United States from contract liability.

---

[1] Petitioners argue (Pet. 7, 11) that the court of appeals' decision conflicts with the Ninth Circuit's decision in *Cervantes* v. *United States*, 330 F.3d 1186 (2003), in which a purchaser who was arrested and imprisoned after hidden marijuana was found in a seized vehicle that he purchased from the United States was allowed to recover under the FTCA. As petitioners acknowledge, the plaintiff in that case was arrested in California, and the FTCA's "foreign country" exception therefore was not at issue. *Id.* at 1187-1188. In any event, petitioners' FTCA claims are not before this Court, so any conflict with *Cervantes* does not provide a basis for this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 2010

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No. 10-99

In The
SUPREME COURT OF THE UNITED STATES

FRANCISCO JAVIER RIVERA AGREDANO and
ALFONSO CALDERON LEON,
Petitioners,
v
UNITED STATES OF AMERICA
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI to the U.S. Court of Appeals for the Federal Circuit

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REPLY BRIEF

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TABLE OF CONTENTS

INTRODUCTION 1

PRE-SALE SEARCH IS NOT A REGULATORY FUNCTION BUT CONDUCTED FOR THE EXPRESS PURPOSE OF THE COMMERCIAL TRANSACTION AND, AS SUCH, PUBLISHED DECISION SETS MISLEADING PRECEDENT ON THIS ISSUE 1

"CLEARLY ERRONEOUS" STANDARD ALSO NOT ADDRESSED 5

EMOTIONAL DISTRESS 10

THIRD PARTY BENEFICIARY CLAIM 11

DISPARATE TREATMENT 12

ARGUMENT IN OPPOSITION TO TRANSFER TO 9TH CIRCUIT WITHOUT LEGAL PRECEDENT 13

INACCURATE FACTUAL CHARACTERIZATIONS 15

CONCLUSION 18

TABLE OF AUTHORITIES

ABF Capital Corp v Osley, 414 F 3d 1061 (9th Cir. 2005)	14
Anderson v United States 344 F.3d 1343 (Fed. Cir. 2003)	2, 7
Baltimore & Ohio R R 261 U.S. 592 (1923)	7
Beagle v Vasold (1966) 65 Cal 2d 16	11
Cervantes v United States 330 F 3d 1186 9th Cir 2003)	13
Cienega Gardens v United States, 194 F 3d. 1231 (Fed Cir. 1998), cert denied, 528 U S 820 (1999)	8-9
Garfoot v Avila (1989) 213 Cal.App 3d 1205	11
Precision Pine v USA (2010) 596 F3d 817 (Fed Cir 2010)	4
Rivera Agredano v USA, 82 Fed Cl. 416 (2008)	6, 7
Rivera Agredano v USA 70 Fed Cl 564 (2006)	7
Rodriguez v USA 69 Fed Cl. 487 (2006)	7, 12
28 U S C Section 1631	14
Federal Rule of Civil Procedure 54	14, 17
7 Wigmore, Evidence (3d ed 1940) Section 1944	11
McCormick on Damages, Section 88, pp 318-319	11

INTRODUCTION

The arguments set forth in the BRIEF FOR THE UNITED STATES IN OPPOSITION rely upon inaccurate presumptions, incorrect factual descriptions and fail to accurately identify or specifically address the majority of the issues as raised by the petitioners in the petition for certiorari.

PRE-SALE SEARCH IS NOT A REGULATORY FUNCTION BUT CONDUCTED FOR THE EXPRESS PURPOSE OF THE COMMERCIAL TRANSACTION AND, AS SUCH, THE PUBLISHED DECISION SETS MISLEADING PRECEDENT ON THIS ISSUE

The lack of a substantive opposition by the United States to the issues as presented in the petition for certiorari is particularly apparent in the ongoing refusal of the United States to directly acknowledge or address the fact that the search at issue in this complaint was a component of the sale transaction and that the pre-sale directives published by the United States [Appendix, page 63] constituted an "objective

manifestation" by the United States of the respondent's understanding of this mutually anticipated sale component [Anderson v United States 344 F.3d 1343, 1353 (Fed. Cir. 2003)]. The undisputed facts found by the Trial Court establish that the post forfeiture search was not a component of the United States regulatory functions (which were performed several months earlier at the time of the seizure) but part of the commercial transaction:

"Defendant's conduct that showed its 'tacit understanding' of this warranty was repeatedly demonstrated by defendant's written policies, by the testimony provided by defendant's agents and by the fact that the circumstances of the sale suggested absolutely no uncertainty on the part of the government that the Pathfinder was free of contraband " [Appendix at pages 71-72]

As is the case in all earlier pleadings filed by the United States in this case, in the opposition brief to this petition, the United States continues to fail to identify the regulation underlying the purported "regulatory activity" that compelled the United States to enter into a sales transaction with the petitioner FRANCISCO JAVIER AGREDANO RIVERA for the sale of this vehicle This is because there is

no such regulation To avoid having to address this issue, the United States glosses over this distinction by not acknowledging or addressing the fact that the pre-sale searches were expressly (per the express language of the United States' own directives) for the purpose of the sale transaction.

The search at issue was not a component of the seizure and forfeiture of the vehicle occurring several months earlier and prior to forfeiture The undisputed fact is that by the time that the pre-sale search should have, but didn't, occur, the vehicle was owned by the United States. The United States, as owner, could keep it, salvage it, sell it. The United States elected to enter into a commercial transaction and decided to sell the vehicle. The "regulatory" obligation to search the vehicle was not at issue at the time of the commercial transaction at issue in this case

The fact that there is a critical distinction between the initial regulatory search for the purposes of seizing the vehicle and the post forfeiture, pre-sale search was clearly raised in the petition for certiorari By choosing only to address the "regulatory function" search (the search at the time of the initial seizure in January of 2001), the United

States completely failed to address, in any fashion, the search actually at issue in this case – the pre-sale, post forfeiture search that should have been conducted for the sales transaction in September of 2001 per the United States' own written policies. The petition raised the point that the failure to acknowledge this distinction was one of the main perceived problems with the published decision issued by the Court of Appeal. The United States should have addressed this issue directly as this distinction is critical to the argument that the published ruling of the Court of Appeal in this case is a misleading precedent.

As the published Court of Appeal holding in this case is already being relied upon for the proposition that the "a contracting party cannot rely on (regulatory) violations to establish a contractual violation to a party to whom the statutory duties were not owed" [Precision Pine v USA (2010) 596 F3d 817 at page 830 (Fed.Cir 2010)] and this holding has little to do with the facts or circumstances involved in the Agredano v USA case, the published opinion of the Court of Appeals in this case sets an inaccurate and misleading precedent and should be overturned.

"CLEARLY ERRONEOUS" STANDARD ALSO NOT ADDRESSED

As with the critical factual distinction between the regulatory seizure search in January of 2001 and the post forfeiture commercial transaction search which should have occurred several months later (in connection with the sales transaction in September of 2001), in the opposition the United States also does not directly address the fact that the factual findings of the Trial Court (that the facts supporting the implied warranty at issue in this case) must be found to be "clearly erroneous" before they can be overturned on appeal The Trial Court's conclusion of the existence of a implied in fact warranty, despite the disclaimers published in the sale flyer and brochure, is clearly based upon a factual assessment To overturn, the Court of Appeal was required to find that the Trial Court's factual findings were "clearly erroneous" yet failed to do so In fact, the argument that the Trial Court's factual findings were "clearly erroneous" was not even raised by the United States in the Court of Appeal The phrase "clearly erroneous" does not even appear one time in the opposition to this petition despite the significant emphasis on this issue in the petition for certiorari.

The published ruling of the Court of Appeal sets a new legal precedent as it opens the door to the rejection of detailed factual findings by a Trial Court without a determination that the factual findings were "clearly erroneous". The United States claims in the opposition at page 6 that the Court of Appeal overturned the Trial Court "*(W)ithout disturbing any of the predicate facts found by the trial court* ." However, to overturn the Trial Court on the issue of the implied warranty the Court of Appeal necessarily "disturbed" the following factual findings of the Trial Court.

". . the 'as is' clause in the contract does not preclude the existence of a possible implied-in-fact warranty in this case because the "as is" clause does not cover a situation in which the defendant sells the Pathfinder with concealed contraband to plaintiff." [Rivera Agredano v USA, 82 Fed Cl 416, 435 (2008)] . the plain meaning of the 'as-is' clause limits its scope to the construction, maintenance, and mechanical operation of the vehicle and does not cover a situation in which 'the vehicle had been modified in a way that had no effect on its ability to function for transportation' by 'introduc[ing] an attribute not ordinarily associated with [the vehicle's ability to function for transportation].'"

[Rivera Agredano v USA, 82 Fed Cl 416, 435 (2008) citing Rivera Agredano v USA 70 Fed Cl 564 at 572 (2006) citing Rodriguez v USA 69 Fed Cl. 487, 498 (2006)]

"The scope of the "as is" provision is "**founded upon a meeting of minds**, which, although not embodied in an express contract, **is inferred, as a fact**, from **conduct of the parties** showing, **in the light of the surrounding circumstances**, their tacit understanding." [Rivera-Agredano v USA, 82 Fed Cl. 416, 440 (2008)(emphasis added); citing, Baltimore & Ohio R R 261 U S. 592 at 597 (1923)]

These holdings were clearly factual conclusions by Judge Hewitt which she felt supported the legal conclusion that the disclaimers printed by the United States and posted/distributed at the sale did not preclude the finding of an implied warranty in this case.

The United States argues in the opposition that the Court of Appeal did not reject judge Hewitt's factual findings but merely looked at the "As-Is" disclaimer in a factual vacuum and determined that, when all of the underlying facts are disregarded, the finding of any implied warranty was "incongruous" with the disclaimers in a sale

flyer and brochure stating that the vehicle was purchased "As Is". This holding simply disregards the fact that the Trial Court found that, **under the facts of this case**, the "As Is" provision did NOT apply to attributes added to the vehicle and not typically considered part of a motor vehicle (such as the over 37 pounds of marijuana that the Trial Court found was not an attribute of a typical Nissan Pathfinder's wheel wells and door panels) The Trial Court's conclusion was supported by the factual finding arising from, in part, the United States own written directives [Appendix at pages 71-72] requiring the removal of this atypical attribute (concealed marijuana) before the vehicle was sold in a post-forfeiture, purely commercial, sales transaction These factual findings would necessarily have to be "disturbed" in order to overturn the Trial Court's ruling on the issue of the implied warranty.

The United States cites to the case of Cienega Gardens v United States, 194 F 3d. 1231, 1239 (Fed Cir 1998), cert denied, 528 U S 820 (1999) claiming that the case supports a *de novo* review of the facts in this case by the Court of Appeal [Opposition at page 5] This is an inaccurate description of the holding in Cienega, Id., In Cienega, Id , the Court found that. "Whether a contract exists is a mixed question of law and fact [citations omitted].

Since the parties do not dispute the relevant facts, the privity issue reduced to a question of law, which we review *de novo* " [Cienega, Id at 1234]

The Cienega, Id case at 1234 found on a motion for summary judgment that no privity existed between the parties. In contrast, there is no issue of privity in this case as to the implied warranty cause of action As such, the Cienega, Id , case does not stand for the proposition that the Court of Appeal could conduct a *de novo* review of the facts in this case The standard to overturn a Trial Court's factual findings should remain "clearly erroneous" and the fact that the United States cited to Cienega, Id , is even more support for the assertion that the published ruling of the Court of Appeals in this case is contrary to well established precedent (i e , that a trial court's factual findings must be "clearly erroneous" to be overturned on appeal) and misleading

The holding in the published opinion in the instant case establishes a new legal precedent that is contrary to the long held policy that the Trial Court has a superior vantage point to evaluate facts As such, the Court of Appeal's published opinion on this issue should be reviewed as it is inconsistent with the rulings of other Courts of Appeal

EMOTIONAL DISTRESS

The United States does not contest in the opposition the petitioners' argument that this case presents the type of factual situation that warrants an award of emotional distress under the implied warranty theory The United States argues in the opposition that there was inadequate evidence of emotional distress damages to warrant an award for emotional distress [Opposition at page 8]. The Trial Court discussed the extensive evidence of emotional distress introduced at the trial [Appendix at pages 93-98] and ultimately found that the evidence lacking at the time of trial was evidence of specific monetary amount for emotional distress. [Appendix at pages 100-101] However, the established precedent is clear that evidence of a specific monetary amount for an award of emotional distress damages is not required

"Pain and suffering, by definition, is an abstract concept. It is not readily calculable through a convenient mathematical formula, **evidence of its precise monetary equivalent cannot be definitively presented** as if it was past medical expenses or wages lost due to an injury Indeed, the jury is only instructed to award a "reasonable"

amount, that a definite standard or method of calculation does not exist, **and argument urging a particular calculation or amount must not be considered evidence**." [Garfoot v Avila (1989) 213 Cal App 3d 1205, 1212 (emphasis added); Beagle v Vasold (1966) 65 Cal 2d 166, 181 citing, 7 Wigmore, Evidence (3d ed 1940) Section 1944, pp 55-56, McCormick on Damages, Section 88, pp. 318-319]

The Trial Court's published decision is clearly inconsistent and in conflict with the decisions of the other Court of Appeals that have considered this issue and the CA Supreme Court ruling in Beagle v Vasold (1966) 65 Cal 2d 166, 181 This published holding by the Trial Court sets an inaccurate precedent (i e., that evidence of a specific monetary amount is required before emotional distress damages may be awarded) and should be overturned.

THIRD PARTY BENEFICIARY CLAIM

The United States does not address the third party beneficiary claim of ALFONSO CALDERON LEON except in a passing reference in connection with the argument against a finding of an implied warranty However, the

published decision of the Trial Court [both in the instant case and the similar case of Rodriguez v USA; 69 Fed. Cl. 487 (2006)] sets an inaccurate precedent as well. It is not logical to contend that ALFONSO CALDERON LEON, as a passenger in a drug laden vehicle, was not within the scope of anticipated victims should the drugs be discovered by law enforcement The precedents set by the holdings in the instant case and the similar case of Rodriguez v USA, 69 Fed. Cl. 487 (2006) would allow a party involved in the sale of a vehicle to avoid liability to everyone except the direct purchaser should the vehicle have a defect (in this case, concealed marijuana) making the vehicle unsafe for all occupants (not just the driver) This is another precedent arising from the published decisions in this case which should be reviewed as it is misleading and an inaccurate recitation of established law

DISPARATE TREATMENT

The illogical and inconsistent results that will occur should the inconsistent ruling and holdings referenced above be allowed to stand is most dramatically illustrated by comparing this case to the case of Jose Cervantes The United States also failed to directly address this issue (except

in a passing reference in a footnote on page 10 of the opposition) The decision rendered by the United States Court of Appeals for the Federal Circuit has the potential to unfairly and adversely impact many members of the general public. The ruling furthermore will have an unreasonably disparate impact on individuals (including US citizens) who purchase a vehicle from the USA and then drive over the border into Mexico before being wrongfully arrested for large loads of marijuana left in the vehicle by the USA at the time of the sale In the case of Jose Cervantes, Mr Cervantes (also a citizen of Mexico) suffered this exact same harm and was allowed to prevail solely because his arrest occurred in San Ysdiro, CA and not in Mexico [see, Cervantes v United States 330 F 3d 1186 (9th Cir 2003)]. There is no logical basis to establish a precedent based on the sole distinction of where one happens to be arrested.

ARGUMENT IN OPPOSITION TO TRANSFER TO 9TH CIRCUIT WITHOUT LEGAL PRECEDENT

The United States offers no authority for the argument made on page 8-9 of the opposition that Judgment on the tort causes of action automatically entered "150 days from entry on the civil docket" of the ruling on the United

States' motion for summary judgment by the Southern District of California despite the fact that the same case was still pending, against the exact same defendant, on the contractual causes of action and without an order for entry of judgment under Federal Rule of Civil Procedure Rule 54.

The United States cites the case of ABF Capital Corp v Osley, 414 F 3d 1061, 1064 (9th Cir 2005) in support of this argument but this case does not stand for the proposition that more than one judgment can be entered against the same defendant on the same set of facts The issues related to the dismissal of the FTCA cause of action should be transferred to the Ninth Circuit Court of Appeals for determination. The FTCA issues were dismissed as a result of the ruling on the motion for summary judgment by the Southern District of California, were not waived and have not yet been conclusively determined in this action No final judgment from which an appeal could be taken was entered as a result of the dismissal of the tort causes of action in the motion for summary judgment until the instant appeal was filed (at which time the issue of the summary dismissal of the FTCA causes of action was properly raised). [28 U S.C. Section 1631] As the Court of Appeal for the Federal Circuit lacked jurisdiction due to the Tucker Act to consider this properly

raised issue on appeal, a transfer to the Ninth Circuit Court of Appeal is proper and the only equitable manner in which to ensure that the petitioners' rights in this case are fully and fairly considered

INACCURATE FACTUAL CHARACTERIZATIONS

The United States' description of some of the underlying facts is misleading in some critical respects:

1 Knowledge of the existence of the concealed marijuana: On page two of the opposition, the United States contends as follows: "*Unbeknownst to either party, the vehicle contained a significant amount of concealed marijuana*." This contention is repeated on page 10. While it is accurate to say that the petitioner was unaware of the concealed marijuana, the United States clearly should have known of the strong probability that the vehicle still contained marijuana (1) a large amount of marijuana was discovered in the gas tank during the seizure search in January of 2001 [Appendix at page 48-51], (2) the United States was aware that if narcotics were concealed in one part of the vehicle, there was a strong probability that narcotics were concealed in other parts of the vehicle as well

[Appendix at page 51 referencing redacted portion of the testimony of Mr. Marilao at transcript 421:20-21] (3) the back seat and doors of the vehicle at issue in this case had obviously never been searched as these areas were in a pristine condition at the time of the sale in September of 2001 [as shown in the photographs obtained from the United States pursuant to petitioners' Freedom of Information Act request; Appendix at page 84-86].

One contracting party, the United States, had superior knowledge of this risk (a risk that would tend to lower the selling price of the merchandise if known to the purchaser) but did not disclose this heightened risk to the other contracting party and also failed to perform the acts that the United States knew were mutually presumed to be a part of the commercial transaction -- a pre-sale search (an implied contractual term objectively manifested in the United States' written pre-sale directives) putting all future occupants of the vehicle (not just the owner/driver) at risk. Therefore, to the extent that the United States is attempting to infer that both contracting parties were equally ignorant of the risk presented by the concealed marijuana, this inference is not supported by the facts as found by Judge Hewitt

2 Contention that motion for summary judgment ruling was not appealed and the tort causes of action dismissed without prejudice is inaccurate

The petitioners did appeal the ruling on the motion for summary judgment but dismissed the same in light of the fact that the United States demanded a dismissal due to a lack of a final judgment by virtue of the transfer of the case to the Court of Federal Claims. In direct contradiction to the argument presented at the time of the dismissal of the appeal, the United States now attempts to convince this Court that a final judgment on the tort causes of action entered automatically "150 days from entry on the civil docket" of the ruling on the United States' motion for summary judgment by the Southern District of California

The only final judgment ever issued in this case involving the United States (judgment was entered in favor of EG&G under Rule 54 in 2004), and from which an appeal was possible, was the judgment issued by the Court of Federal Claims in 2008 The dismissal of the tort claims was raised in the appeal to the Court of Appeals and again in the pending Petition for Certiorari The "splintering" of this case is the result of the Tucker Act and should not result in the

petitioners' loss of a right to pursue an appeal of the dismissal of the torts causes of action on the motion for summary judgment heard in the Southern District of California prior to the transfer of the case to the Court of Federal Claims under the Tucker Act

CONCLUSION

For the above reasons, the petition for a writ of certiorari should be granted.

12-21-10 Respectfully submitted,

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